SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 13

THE TRAINOR COMPANY, PETITIONER,

vs.

THE ÆTNA CASUALTY & SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Page
Record from district court of the United States, Eastern Pennsylvania.	1
Docket entries	1
Plaintiff's statement of claim	4
Exhibit "A"—Bond	9
Affidavit of defense	17
New matter	19
Plaintiff's reply to new matter	25
Stipulation of counsel amending affidavit of defense	29
Stipulation of counsel waiving trial by jury	30
Opinion, Kirkpatrick, J., sur pleadings and proofs	31
Plaintiff's motion for new trial	44
Order denying new trial	46
Plaintiff's motion for judgment on the record	46
Order denying plaintiff's motion for judgment	46
Præcipe for judgment	47
Judgment	47
Bill of exceptions	48
Petition for appeal	53
Order allowing appeal	54
Assignments of error	54
Præcipe for transcript of record	57
Clerk's certificate	59
Proceedings in United States circuit court of appeals, third circuit	61
Minute entry of argument and submission	61
Opinion, Buffington, J.	63
Judgment	69
Clerk's certificate	70
Order allowing certiorari	71

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 17, 1933

IN THE

District Court of the United States,

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 15318. March Term, 1930.

THE TRAINOR COMPANY	David L. Ullman
v.	
THE AETNA CASUALTY & SURETY COMPANY.	J. W. Henderson

DOCKET ENTRIES.

Mar. 31, 1930.	Præcipe to issue Summons filed.
Mar. 31, 1930.	Summons exit—returnable 1st Monday in April.
Mar. 31, 1930.	Statement of Claim filed.
Mar. 31, 1930.	Notice to file affidavit of defense filed.
Apr. 1, 1930.	Summons returned: "service accepted as of March 31, 1930" and filed.
Apr. 10, 1930.	Affidavit of Defense and New Matter filed.
Apr. 10, 1930.	Notice to file reply to new matter filed.
Apr. 16, 1930.	Præcipe to place case on Trial List filed.
Apr. 24, 1930.	Stipulation of counsel in re: Affidavit of Defense filed.

Apr. 26, 1930.	Rule for judgment for want of sufficient affidavit of defense and answer in lieu of demurrer to new matter filed.
Oct. 21, 1930.	Plaintiff's reply to new matter filed.
Oct. 22, 1930.	Præcipe to withdraw rule for judgment for want of sufficient affidavit of defense filed.
Oct. 30, 1930.	Stipulation of counsel to try case before the Court without a jury filed.
Nov. 5, 1930.	Trial before Court without a jury.
Dec. 19, 1930.	Argued sur Pleadings and Proofs.
Feb. 13, 1931.	Opinion, Kirkpatrick J., granting leave to enter judgment in $5.00 for plaintiff filed.
Feb. 17, 1931.	Motion for new trial filed.
Feb. 17, 1931.	Plaintiff's motion for judgment on the record filed.
Feb. 17, 1931.	Plaintiff's bill of costs filed.
June 19, 1931.	Order of Court denying motion for new trial filed.
Oct. 21, 1931.	Order of Court denying motion for judgment on the record filed.
Dec. 1, 1931.	Præcipe to enter judgment in favor of plaintiff filed.
Dec. 1, 1931.	Judgment in favor of plaintiff in $5.00 and against defendant filed.
Dec. 1, 1931.	Bond for costs sur appeal in $250, with surety, and Order of Court approving bond filed.

Dec. 1, 1931. Bill of Exceptions and Order of Court sealing same filed.

Dec. 1, 1931. Petition for appeal and Order of Court granting appeal filed.

Dec. 1, 1931. Citation allowed and issued.

Dec. 1, 1931. Copy of notice of appeal filed.

Dec. 7, 1931. Assignments of Error filed.

Dec. 10, 1931. Citation returned: "service accepted" and filed.

Dec. 31, 1931. Præcipe as to transcript of record sur appeal filed.

PLAINTIFF'S STATEMENT OF CLAIM.

(Filed March 31, 1930.)

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 15318. March Term, 1930.

The Trainor Company (a Corporation),

v.

The Aetna Casualty & Surety Company (a Corporation).

The plaintiff, The Trainor Company, claims of the defendant, The Aetna Casualty & Surety Company, the sum of $18,006, with legal interest thereon from March 1, 1930, upon a cause of action, whereof the following is a statement:

1. The plaintiff is a corporation organized under the laws of the State of Delaware for the purposes, *inter alia,* of engaging in the real estate brokerage or realty business, and duly authorized to do business in the Commonwealth of Pennsylvania.

2. The defendant is a corporation organized under the laws of the State of Connecticut and engaged, *inter alia,* in the business of executing, for a consideration or premium, bonds guaranteeing the completion of building operations.

3. This controversy is of a civil nature, and the amount involved exceeds the sum of $3000 exclusive of interest and costs.

4. On or about the thirteenth day of October, 1927, the defendant, The Aetna Casualty & Surety Company, executed under seal and for a consideration or premium, its certain bond or writing obligatory, and did acknowledge itself held and firmly bound unto The Trainor Company, its successors, assigns and nominees, in the sum of $220,000 upon, *inter alia*, the following terms and conditions:

"

"WHEREAS, the said Principal further desires that said Trainor Company accept its collateral note in the amount of ($28,000) Twenty-eight Thousand Dollars bearing six per cent interest, which is the balance of the purchase price due said Trainor Company by said Principal in the sale of Fifty-two lots hereinafter mentioned, and have offered as security to said obligees, respectively, the following mortgage collateral:

"

"(c) Said Trainor Company is to have the equity in the said Fifty-two First Mortgages subject to and above the said loans of said Trust Company and Realty Bond, and in the said Blanket Second Mortgage subject to and above the loan of said Realty Bond:

"

"NOW, THEREFORE, THE FURTHER CONDITIONS OF THIS BOND ARE AS FOLLOWS:

"1. That, if within ten months from the date hereof each of the lots or premises described in each of the said Fifty-two First Mortgages shall be fully improved and completed with a building, together with the other improvements (such as paved streets, sidewalks, driveways, gas, water, sewerage, etc.), in keeping with and as shown by the aforesaid Plans, Specifications and Conditions, Building Plats and Surveys,

"

"THEN, in the event that all of the above and below mentioned conditions are fully performed, this Bond shall be void, otherwise it shall remain in full force and effect in law."

A full, true and correct copy of the said Bond and obligation is attached hereto, made part hereof, and marked Exhibit "A."

5. In consideration of its execution of the said bond, as more fully set forth above, the defendant, The Aetna Casualty & Surety Company, received and retained as consideration or premium the sum of $3300.

6. Plaintiff avers that the conditions of the said bond were not fully performed, but that the said conditions were breached and broken in that each of the said fifty-two lots or premises covered by the said bond were not fully improved and completed with a building, together with the other specified improvements, within ten months from the date of the said bond (to wit: October 13, 1927); but that on the contrary but twelve of the said fifty-two lots were fully completed and improved upon the expiration of the said ten months' period (to wit: August 13, 1928); and the remaining lots and premises were and remained in an unfinished, incomplete and only partially improved condition for a long period of time after the said ten months' period had expired, so that twenty-eight of the said premises still remained incomplete and unfinished, as aforesaid, as of the date this suit was filed, to wit: December 22, 1929.

7. Plaintiff further avers that during and at the expiration of the said ten months' period, to wit: From October 13, 1927, to August 13, 1928, the fair, reasonable and market value of the said lots or premises improved and completed in keeping with and as shown

by the plans, specifications and conditions, building plats and surveys as specified in the said bond, was not less than $7950 each; and plaintiff further avers that each of the twelve lots, or premises, so improved and completed within the said ten months' period was actually sold at a bona fide price of not less than $7950 each.

8. Plaintiff avers that in the interim between the expiration of the said ten months' period (to wit: August 13, 1928) and the time when the premises then remaining unfinished were finally completed and improved in accordance with the plans, specifications and conditions, building plats and surveys specified in the said bond, that the fair market value of the said lots or premises as so improved had decreased, in part due to the decline in the real estate market, and further due to the fact that other operative builders had then completed homes in the immediate vicinity and substantially of the same general character, but including additional facilities, which were offered for sale at a much lower price, so that the fair, reasonable and market value of the said lots or premises improved in accordance with the provisions of the bond was not more than $6550 each at the time when the last twenty-eight of them were finally completed.

9. Plaintiff further avers that liens and encumbrances senior to that held by the plaintiff, together with accumulated interest and penalties, necessary sales expense and other charges taking precedence over the plaintiff's lien substantially exceeded the sum of $6550, which was as aforesaid, the fair market value of the premises when finally completed.

10. Plaintiff avers that taxes and interest on mortgage liens were permitted to accumulate and remain

unpaid on the unfinished properties, so that on or about January 26, 1930, the twenty-eight premises then remaining unsold were sold by the sheriff of Delaware County as a result of foreclosure proceedings on liens senior to that held by the plaintiff, and at said sale were sold to the attorney on the writ for the sum of $50 each.

11. Plaintiff avers that it has received on account of its said obligation the sum of $28,000, with interest thereon, the sum of $13,026.02 and no more.

WHEREFORE, the plaintiff claims there is justly due and owing to it from the defendant the sum of $18,006 with legal interest thereon from the first day of March, 1930.

Hence this suit.

DAVID L. ULLMAN,
Attorney for Plaintiff.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

EDWARD E. DICKER, being duly sworn according to law, deposes and says that he is the secretary of THE TRAINOR COMPANY, plaintiff in the foregoing action, and authorized by it to take this affidavit on its behalf; that he is familiar with the facts hereinbefore set forth, and the said facts are true.

E. E. DICKER.

Sworn to and subscribed before me this thirty-first day of March, A. D. 1930.

HARRY B. BERK,
Notary Public.

EXHIBIT "A."

KNOW ALL MEN BY THESE PRESENTS: That COPLEY HOMES, INC., a Delaware Corporation, hereinafter called Principal, and THE AETNA CASUALTY AND SURETY COMPANY, a Corporation organized under the Laws of the State of Connecticut, hereinafter called Surety, said Principal and Surety hereinafter called Obligors, are held and firmly bound unto THE LAND TITLE AND TRUST COMPANY, a Pennsylvania Corporation, its Successors, Assigns and Nominees, hereinafter called Trust Company, unto REALTY BOND AND FINANCE CORPORATION, a Delaware Corporation, its Successors, Assigns and Nominees, hereinafter called Realty Bond, and unto THE TRAINOR COMPANY, a Delaware Corporation, its Successors, Assigns and Nominees, hereinafter called Trainor Company, said Trust Company, Realty Bond and Trainor Company hereinafter called Obligees, in the sum of ($220,000.) Two Hundred Twenty Thousand Dollars, to be paid to each of the said Obligees, their respective Successors, Assigns and Nominees, and as hereinafter provided, to the payment whereof the said Obligors do hereby bind themselves, jointly and severally, their and each of their Successors and Assigns, firmly by these presents:

THIS BOND SEALED with the seals of the Obligors and dated the Thirteenth day of October, 1927.

WHEREAS, the said Principal desires to obtain a loan of ($238,000.) Two Hundred Thirty-eight Thousand Dollars from the said Trust Company, on its collateral note, bearing six per cent interest, and a loan of ($63,000.) Sixty-three Thousand Dollars from said Realty Bond, on its collateral note, bearing six per cent interest, and said Principal further desires that said Trainor Company accept its collateral note in the amount of ($28,000.) Twenty-eight Thousand Dollars,

bearing six per cent interest, which is the balance of the purchase price due said Trainor Company by said Principal in the sale of the Fifty-two lots hereinafter mentioned, and have offered as security to said Obligees, respectively, the following mortgage collateral:

(a) Firty-two individual first Mortgages and accompanying Bonds and Warrants, to be delivered and assigned to said Trust Company and/or its Assigns or Nominees, bearing date of the Thirteenth day of October, 1927, and executed by Margaret M. Rogers, as Mortgagor, in favor of said Principal as Mortgagee; each of said Mortgages being secured by the conveyance therein of a lot of ground and premises located on the Southeasterly side of Copley Road, between Walnut and Locust Streets, Township of Upper Darby, Delaware County, State of Pennsylvania, each of Forty-eight of said Mortgages and Bonds and Warrants securing the repayment of a loan of ($4500.) Forty-five Hundred Dollars with interest, each of Two of said Mortgages and Bonds and Warrants securing the repayment of a loan of ($6000.) Six Thousand Dollars with interest, and each of the remaining Two of said Mortgages and Bonds and Warrants securing the repayment of a loan of ($6500.) Sixty-five Hundred Dollars with interest, the total of the principal amounts of the said Fifty-two Mortgages being ($241,000.) Two Hundred Forty-one Thousand Dollars;

(b) One Blanket Second Mortgage with accompanying Bond and Warrant securing the principal of ($88,000.) Eighty-eight Thousand Dollars, to be delivered and assigned to said Realty Bond and/or its Assigns or Nominees, bearing same date as aforesaid first Mortgages, executed by same Mortgagor in favor of same Mortgagee, secured by Forty-eight (inside lots) of the aforesaid Fifty-two lots and premises

(which lots and premises may be partially released as provided in said Blanket Second Mortgage or as assented to from time to time by the then holder of said Blanket Second Mortgage), and which Blanket Second Mortgage is subject to the operation and effect of each of said ($4500.) Forty-five Hundred Dollar First Mortgages on each of said lots, and said Realty Bond is also to have the equity in the said Fifty-two first Mortgages subject to and above the said loan of the Trust Company;

(c) Said Trainor Company is to have the equity in the said Fifty-two first Mortgages subject to and above the said loans of said Trust Company and Realty Bond, and in the said Blanket Second Mortgage subject to and above the loan of said Realty Bond; and

WHEREAS, the said Obligors, to induce the said Trust Company and the said Realty Bond to grant the above loans of money on the security of said Mortgages, as aforesaid, and to induce the said Trainor Company to accept the said collateral note for sale balance of purchase price, on the security of the said equities in said Mortgages, represent and warrant that each of the said Fifty-two lots will be improved with a building and other improvements (such as paved streets, sidewalks, driveways, water, gas, sewerage, etc.), in keeping and in accordance with the Plans, Specifications and Conditions, Building Plats and Surveys, identified by the signatures of the said Obligors, by any officer or agent, and by Louis S. Ashman, Agent, free and clear of any and all Municipal and Mechanics' Liens, taking or claimed to be taking precedence over any of aforesaid Mortgages; and

WHEREAS, the Obligors to induce the said Trust Company or any other Title or Trust Company to issue

its Municipal and/or Mechanics' Liens insurance (at any time) in favor of any Mortgagee, Assignee, Purchaser and/or Grantee, of or relating to any one or more of said Fifty-two lots, have agreed to hold any such Title or Trust Company harmless from loss, cost or damage due to its issuance of the aforesaid liens insurance; and

WHEREAS, to induce and aid the ready sale, mortgaging, financing and refinancing of any one or more of said Fifty-two lots, with the improvements and additions aforementioned, the Obligors herein and hereby agree to hold any insuring Trust and/or Title Company, Purchaser, Grantee and/or Mortgagee of any of said lots or premises, and their respective Heirs, Personal Representatives, Successors and Assigns, harmless from any loss, cost or damage due or claimed to be due to any Municipal and/or Mechanic's Liens arising from the making of any part of the said buildings and improvements, with the right to any such party or parties to recover on this Bond as fully and as effectively as if such party or parties were specifically named as obligees herein.

NOW, THEREFORE, THE FURTHER CONDITIONS OF THIS BOND ARE AS FOLLOWS:

1. That, if within ten months from the date hereof each of the lots or premises described in each of the said Fifty-two first Mortgages shall be fully improved and completed with a building, together with the other improvements (such as paved streets, sidewalks, driveways, gas, water, sewerage, etc.), in keeping with and as shown by the aforesaid Plans, Specifications and Conditions, Building Plats and Surveys, (but said Trust Company and its Successors may in writing direct or assent to changes or additions in the said Plans

and Specifications that do not increase the total cost of construction as shown by the Schedule of Operation approved by the said Principal at settlement, by more than five per cent, and such changes or additions so directed or approved by said Trust Company shall be made and complied with as fully and as effectively as if they were originally written into the said Plans and Specifications); and

2. That, if each and all of the said buildings and other improvements, as aforesaid, shall be made, free and clear of all Municipal and Mechanics' Liens for material and/or Labor taking or claimed to be taking precedence or priority to or over any or all of the said Mortgages, and/or the lots or premises secured thereby; and

3. That, if the said Trust Company, its Assigns or Nominees, are held harmless from all costs and loss due to its issuance of its insurance, as aforesaid, and the Trust Company is otherwise held harmless from any damage, cost or loss, and all other named or unnamed Obligees under the terms of this Board are held harmless from any damage, cost or expense;

THEN, in the event that all of the above and below mentioned conditions are fully performed, this Bond shall be void; otherwise it shall remain in full force and effect in law.

In addition to any other remedy or measure of damage provided for or recoverable under the terms of this Bond, any one or more of the herein named Obligees are hereby authorized and empowered (in their respective discretion) at the expense of, in the name of, and for the joint or several account of the obligors, to do any or all of the following things (shown in paragraphs (a) to (c), inclusive):

(a) On ten days written notice to the herein Surety, any one or more of the said Obligees may replace any Contractor who may fail to diligently proceed (for any reason) to perform the work and/or supply the material covered by his or their Contract for any part of the building or improvements covered by the aforesaid Plans and Specifications and Conditions, and may in place and stead of such replaced Contractor, employ any other party or parties to do, supply and complete the work and/or material called for under the terms of any such Contract. However, said Surety shall have the right within said ten days to arrange for the prompt supply and completion of such work and material, with a party or parties satisfactory as to competence to said Trust Company or its Successors.

(b) On fifteen days written notice to the herein Surety, any one or more of the said Obligees may pay and discharge, or defend, any Municipal or Mechanics' Lien directed against any of the aforesaid mortgaged premises, when such lien takes precedence or is claimed to take precedence to or over any of the aforesaid First or Second Mortgages. However, within said fifteen days the said Surety may pay and discharge such liens, or may defend same to the satisfaction of said Trust Company or its Successors.

(c) Should the said buildings and improvements be not fully completed in accordance with the aforesaid Plans and Specifications and Conditions within ten months from date hereof, any one or more of said Obligees may on fifteen days written notice to the herein Surety, arrange or contract for the completion of such unfinished work and/or material. However, said Surety may within the said fifteen days arrange for the completion of said unfinished work and ma-

terial within sixty days from the date of such notice, by a party or parties satisfactory as to competence to said Trust Company or its Successors.

In the event that any of the aforesaid buildings and improvements are not made and completed, free and clear of Municipal and Mechanics' Liens, as aforesaid, within the aforesaid ten months time for completion, and any holder of any of aforesaid three collateral notes shall thereafter cause the mortgage collateral or the equity in the mortgage collateral mentioned therein and still held to be offered at public sale, upon forty-five days written notice to said Obligors, mailed to the Philadelphia office or agency of the said Surety, of the place (in Philadelphia) and time, when such collateral will be publicly offered for sale, it is hereby agreed that any balance still remaining due and unpaid under the terms of such note, after applying the net proceeds arising from such sale, shall be, jointly and severally, due and payable by the said obligors unto the then holder of such note and assigns, as fully and effectively as if such holder and assigns were named Obligees in this Bond. The provisions of this paragraph shall be deemed an additional method for the establishment of any loss in the collection of the money or monies due under the terms of the said notes, respectively, due to incompletion, free and clear of liens, as aforesaid, and other rights, promises or obligations existing or arising under the terms of this Bond shall remain in force and effect, whether or not said method is employed.

Any holder at any time of any of said three notes, may assent to the release of any of the collateral mentioned therein upon such terms and for such considerations as may seem expedient to the holder.

No action shall be brought on this Bond after thirty-six months from the date hereof.

WITNESS the signatures and seals of the said Obligors, the day and year first above written.

COPLEY HOMES, INC.,

By: LOUIS W. FOLSCHEID
(~~Vice~~) President.

ATTEST:

HARRY J. GELSMAN
Secretary

THE AETNA CASUALTY AND SURETY COMPANY,

By: WILLIAM P. ROBERTS
Resident Vice-President.

ATTEST:

A. F. TIMMINS
Resident Asst. Secretary.

AFFIDAVIT OF DEFENSE.

(Filed April 10, 1930.)

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.:*

James J. Murray, being duly sworn according to law, deposes and says that he is resident vice-president of the Aetna Casualty and Surety Company; that he is authorized to make this affidavit of defense in its behalf; and that it has a just, true, full, legal and complete defense to the whole of the plaintiff's claim of the following nature and character, to wit:

1. Admitted.

2. Admitted.

3. Admitted.

4. The defendant admits that the bond attached to the statement of claim marked Exhibit "A" is a true and correct copy of the bond executed by the defendant, and, therefore, denies any averments in this paragraph which are inconsistent with the said bond, as it speaks for itself.

5. It is admitted that the defendant received the sum of $3300 as a premium on said bond marked Exhibit "A."

6. The defendant, after having made inquiry from all sources of information open to it, is informed, believes and expects to be able to prove at the trial of this cause that more than twelve of the fifty-two lots were fully improved and completed with the buildings, together with the other specified improvements, within

ten months from the date of said bond, and that the remaining lots and premises were substantially completed at that time, in accordance with the custom of the building operation business, and that the entire building operation was completed fully on or before December 27, 1929.

7. The defendant admits that certain of the completed houses were sold for the sum of $7950 each during the year 1928, and that likewise certain of the premises were sold in 1929 for the same price, and that the fair, reasonable and market value of the said lots and premises so improved and completed within the ten months from the date of the bond was not less than $7950 each.

8. The defendant, after having made inquiry from all sources of information open to it, is informed, believes and expects to be able to prove at the trial of this cause that the premises which were unfinished within the ten months' period from the date of the bond had not decreased or depreciated so that the fair, reasonable and market value of the said lots and premises improved in accordance with the provisions of the said bond was not more than $6500 each at the time the last twenty-eight of them were finally completed, but avers and expects to be able to prove that at the expiration of the ten months from the date of the said bond, the said real estate, with the buildings thereon in their uncompleted state, had a fair, reasonable and market value in excess of the sum of $6500 each, being in excess of the amount of the liens thereon, including the equity in the first and second mortgages, which were security for the collateral note, the basis of this suit.

9. The defendant, after having made inquiry from all sources of information open to it, is informed, be-

lieves and expects to be able to prove at the trial of this cause that the averments in paragraph 8 are untrue.

10. The defendant admits that on or about January 26, 1930, the twenty-eight premises remaining unsold were sold by the sheriff of Delaware County as a result of foreclosure proceedings, and at said sale were sold to the attorney on the writ for the sum of $50 only, and not for the sum of $50 each. The defendant avers that the other allegations in paragraph 9 are immaterial.

11. The defendant, after having made inquiry from all sources of information open to it, is informed, believes and expects to be able to prove at the trial of this cause that the plaintiff has received a sum in excess of $13,026.02 on account of its said collateral note of $28,000 from Copley Homes, Inc.

NEW MATTER.

12. The defendant avers that the said bond, Exhibit "A" of the statement of claim, provides, *inter alia:*

> "In addition to any other remedy or measure of damage provided for or recoverable under the terms of this Bond, any one or more of the herein named obligees are hereby authorized and empowered (in their respective discretion) at the expense of, in the name of, and for the joint or several account of the Obligors, to do any or all of the following things (shown in paragraphs (a) to (c), inclusive):
>
> "(a) On ten days written notice to the herein Surety, any one or more of the said Obligees may replace any contractor who may fail to diligently proceed (for any reason) to perform the work and/or supply the material covered by his or their Contract for any part of the building or improvements covered by the aforesaid Plans and Specifi-

cations and Conditions, and may in place and stead of such replaced Contractor, employ any other party or parties to do, supply and complete the work and/or material called for under the terms of any such Contract. However, said Surety shall have the right within said ten days to arrange for the prompt supply and completion of such work and material, with a party or parties satisfactory as to competence to said Trust Company or its Successors.

"(b) On fifteen days written notice to the herein Surety, any one or more of the said Obligees may pay and discharge, or defend, any Municipal or Mechanics' Lien directed against any of the aforesaid mortgaged premises, when such lien takes precedence or is claimed to take precedence to or over any of the aforesaid First or Second Mortgages. However, within said fifteen days the said Surety may pay and discharge such liens, or may defend same to the satisfaction of said Trust Company or its Successors.

"(c) Should the said buildings and improvements be not fully completed in accordance with the aforesaid Plans and Specifications and conditions within the next ten months from date hereof, any one or more of said obligees may on fifteen days written notice to the herein Surety, arrange or contract for the completion of such unfinished work and/or material. However, said Surety may within the said fifteen days arrange for the completion of said unfinished work and material within sixty days from the date of such notice, by a party or parties satisfactory as to competence to said Trust Company or its Successors."

and that the plaintiff as an obligee under the said bond has failed to comply with the terms and provisions as set forth in the said paragraphs in any particular, and at no time has given the defendant any notice whatsoever of any default in connection with said bond or has exercised any of the rights provided for thereunder.

13. The said bond Exhibit "A" provides further that in the event any of the buildings and improvements are not made and completed free and clear of municipal and mechanics' liens within the ten months' time for completion and any holder of any of the collateral notes shall cause the mortgage collateral or the equity in the mortgage collateral to be offered at public sale upon forty-five days' written notice to said obligors mailed to the Philadelphia office or agency of the defendant, of the place and time when such collateral will be publicly offered for sale, but the defendant avers that the said plaintiff has at no time given any notice whatsoever, as required by the provisions of the said bond, or sold or offered for sale the collateral as therein required.

14. The defendant, after having made inquiry from all sources of information open to it, is informed, believes and expects to be able to prove at the trial of this cause that The Trainor Company has an equity in the first mortgages subject to and above the loans of the Land Title and Trust Company and the Realty Bond & Mortgage Company, and that there is sufficient equity in said loan to reduce materially the collateral note of Copley Homes, Inc., to the plaintiff.

15. The defendant, after having made inquiry from all sources of information open to it, is informed, believes and expects to be able to prove that the plaintiff has at no time taken any action, given any notices or endeavored to collect on the collateral note given to it by Copley Homes, Inc., and that action should be taken thereon before any recourse is had on the bond of the defendant.

16. The defendant avers that at the expiration of the ten months' period from the date of the bond, the real estate and buildings thereon were in such a state of

substantial completion that it required but a small sum of money to complete said operation, and furthermore that said premises in their uncompleted state as of that time were worth and had a fair, reasonable and market value of a sum in excess of the amounts due on the first and second mortgages, including the equity therein, which were security for the collateral note, the basis of this suit.

17. The defendant is informed, believes and expects to be able to prove at the trial of this cause that the plaintiff took title to the land involved in this operation and after settlement therefor conveyed it to Copley Homes, Inc. The purchase price of said land, including settlement charges, etc., amounting to $72,835.87, was not paid by The Trainor Company, but on the contrary by Copley Homes, Inc., out of proceeds of first and second mortgages placed on said real estate at the time of said settlement, said mortgages realizing the sum of $301,000. The plaintiff received from Copley Homes, Inc., a note for $28,000 secured by equities in the first and second mortgages. The defendant is further informed, believes and expects to be able to prove at the trial of this cause that when the plaintiff received the note of The Trainor Company for $28,000 secured as aforesaid, it did not then or at any other time receive from The Trainor Company $28,000 or any other sum whatsoever, and that said note was given without any valuable consideration, and that the mortgage transaction as alleged security for the same was fictitious.

18. The defendant avers that on or about July 25, 1929, it entered into a settlement with The Sun Mortgage Company, representing itself and with the authority of its subsidiary companies, including the Realty Bond & Mortgage Company, covering, among others,

the building operation, the subject of this suit, known as Copley Homes, Inc. By the terms of that settlement, which was in cash from the defendant, The Sun Mortgage Company agreed on its own behalf and acting for and with the authority of its subsidiary companies, including Realty Bond & Mortgage Company, that it would at its own expense complete or cause to be completed in accordance with the plans and specifications, among others, the building operation covered by the bond of the defendant, Aetna Casualty and Surety Company, known as the Copley Homes, Inc., operation the one involved in this suit. The Realty Bond & Mortgage Company was the holder of the second blanket mortgage in the sum of $88,000 on Copley Homes, Inc., in which mortgage the plaintiff claims an equity. The defendant, after having made inquiry from all sources of information open to it, is informed, believes and expects to be able to prove at the trial of this cause that the plaintiff was cognizant of, informed of and acquainted with the terms of the foregoing settlement made by this defendant with The Sun Mortgage Company covering the building operation known as Copley Homes, Inc., prior to its consummation, and that the plaintiff acquiesced therein and agreed thereto, and further agreed that it was interested only in seeing that the said building operation was fully completed. It is further averred that The Sun Mortgage Company, acting for itself and its subsidiary, the Realty Bond & Mortgage Company, did actually complete Copley Homes, Inc., building operation in accordance with the plans and specifications, and that the same was actually completed on December 27, 1929, prior to the filing of the statement of claim in this suit.

The defendant further avers that the plaintiff's rights were subordinated to and become bound by and with the rights of the Realty Bond & Mortgage Company, to whom the mortgage of $88,000 was assigned by

Copley Homes, Inc., and that the settlement made by the Realty Bond & Mortgage Company through The Sun Mortgage Company binds the plaintiff and has terminated and ended all obligations and rights between the parties of this suit.

All of which is true and correct according to the best of the knowledge, information and belief of the deponent, and defendant so expects to be able to prove at the trial of this cause.

WHEREFORE, the defendant denies that it is indebted to the plaintiff in the sum of $18,006 with legal interest thereon from March 1, 1930, or any other sum or sums whatsoever.

JAMES J. MURRAY.

Sworn to and subscribed before me this eleventh day of April, A. D. 1930.

JOHN H. LUCAS.
Notary Public.

PLAINTIFF'S REPLY TO NEW MATTER.

(Filed October 21, 1930.)

12. Plaintiff is advised by counsel, believes and therefore avers that the allegations in paragraph 12 of defendant's new matter are irrelevant and immaterial to the issue, and that it is therefore not required to affirm or deny the same. Plaintiff, however, avers that the provisions of the bond quoted in this paragraph of defendant's new matter grant to the plaintiff additional powers, which it has the privilege of exercising, in its discretion, but which it is under no obligation to assert.

13. Plaintiff is advised by counsel, believes and therefore avers that the allegations in paragraph 13 of defendant's new matter are irrelevant and immaterial to the issue, and that it is therefore not required to affirm or deny the same. Plaintiff, however, avers that the provision of bond referred to in paragraph 13, bestows upon the plaintiff an additional remedy which it has the privilege of, but which it is under no obligation to exercise. Plaintiff avers that the bond specifically provides that the provisions of this paragraph should be deemed an additional method for establishing plaintiff's loss due to incompletion and that "the other rights, promises or obligations existing or arising under the terms of this bond shall remain in force and effect, whether or not said method is employed."

14. Plaintiff is advised by counsel, believes and therefore avers that the allegations in paragraph 14 of defendant's new matter are irrelevant and immaterial to the issue, and that it is therefore not required to affirm or deny the same. Plaintiff, however, denies that it has any equity of any value whatsoever in the

said first mortgages, but on the contrary avers that the first mortgages aggregated $241,000; that on the security of the said mortgages the Land Title & Trust Company loaned to Copley Homes, Inc., the sum of $238,000; that the equity of $3000 was assigned to Realty Bond & Finance Corporation as security for a loan of like amount; that said loan has not been paid, although long past due, and that said equity has been appropriated by Realty Bond & Finance Corporation. Plaintiff avers that under no circumstances could it have benefited by the assignment to it of the said equity of $3000 (which assignment was subject to prior assignments to the Land Title & Trust Company, as partial security of its loan for $241,000, and was also subject to the assignment to Realty Bond & Finance Corporation as partial security for its loan of $63,000) unless and until the obligations to the Land Title & Trust Company and the Realty Bond & Finance Corporation were repaid in full; and that as heretofore set forth, the obligation of Copley Homes, Inc., to the Realty Bond & Finance Corporation was not paid; but on the contrary, the said Realty Bond & Finance Corporation exposed the said building operation to public sale because of default, and there was realized at the said sale the sum of $50 only.

15. Plaintiff is advised by counsel, believes and therefore avers that the allegations in paragraph 15 of defendant's new matter are irrelevant and immaterial to the issue, and that it is therefore not required to affirm or deny the same. Plaintiff denies that action on the said collateral note is a conditioned precedent to recourse on the bond of the defendant. On the contrary, the plaintiff avers that the two obligations are separate, distinct, and in no wise interdependent.

16. Plaintiff is advised by counsel, believes and therefore avers that the allegations in paragraph 16 of

defendant's new matter are irrelevant and immaterial to the issue, and that it is therefore not required to affirm or deny the same. Plaintiff, however, avers that at the expiration of the period of ten months from the date of the bond, the houses were far short of being substantially completed, and that it would require a large sum of money, substantially in excess of plaintiff's financial interest in the operation, to complete the same in accordance with the terms of the bond, upon which this suit is brought. Plaintiff further avers that subsequent to August 13, 1928, sums of money far in excess of plaintiff's financial interest in the operation had to be spent, and in fact were spent, to complete the operation. Plaintiff further avers that the allegation as to the value of the incompleted premises is irrelevant and immaterial, inasmuch as the bond guarantees completed houses worth the encumbrances. Plaintiff, however, is informed, believes and therefore avers that the houses in the condition in which they were as of August 13, 1928, did not have a market value in excess of $4000.

17. Plaintiff is advised by counsel, believes and therefore avers that the allegations in paragraph 17 of defendant's new matter are irrelevant and immaterial to the issue, and that it is therefore not required to affirm or deny the same. Plaintiff, however, avers that good and valuable consideration was given by the plaintiff for the note of Copley Homes, Inc., and the collateral assigned to the plaintiff as security therefor.

18. Plaintiff is advised by counsel, believes and therefore avers that the allegations in paragraph 18 of defendant's new matter are irrelevant and immaterial to the issue, and that it is therefore not required to affirm or deny the same. Plaintiff, however, avers that it has no knowledge or means of knowledge as to

whether any settlement was concluded by the defendant and the Sun Mortgage Company, nor as to the terms thereof. Plaintiff avers that it has exhausted all means of inquiry open to it, and from its inability to obtain any information, and from its knowledge of cognate collateral matters, believes the averments to be untrue, and therefore denies the same. Plaintiff denies that it was cognizant of, informed of, or acquainted with the terms of the alleged agreement prior to its alleged consummation, but on the contrary avers that it had no knowledge whatsoever of the alleged agreement prior to receiving defendant's pleadings alleging it. Plaintiff denies that it, or anyone with authority to speak on its behalf acquiesced therein or agreed thereto, or agreed that the plaintiff was only interested in seeing the buildings completed. Plaintiff again denies the materiality of such allegations, but if deemed material avers that they and each of them are false and untrue.

Plaintiff denies that its rights were in any way subordinated to or bound by the rights of Realty Bond & Finance Corporation as the defendant alleges, and avers that Realty Bond & Finance Corporation had no authority to act for the plaintiff in the premises, and that it is advised, believes and therefore avers that Realty Bond & Finance Corporation and/or the Sun Mortgage Company never claimed such authority, nor purported so to act. Plaintiff denies that it is to any degree affected by any agreements which may have been entered into between Sun Mortgage Company and/or Realty Bond & Finance Corporation with this defendant.

On the contrary, plaintiff avers that there is justly due and owing from the defendant the sum of $18,006 with legal interest thereon from March 1st, 1930.

DAVID L. ULLMAN,
Attorney for Plaintiff.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

EDWARD E. DICKER, being duly sworn according to law, deposes and says that he is the secretary of THE TRAINOR COMPANY, plaintiff in the foregoing action, and authorized by it to take this affidavit on its behalf; that he is familiar with the facts hereinbefore set forth, and the said facts are true.

EDWARD E. DICKER.

Sworn to and subscribed before me this twentieth day of October, A. D. 1930.

REBECCA BUSCHEL,
(Seal) *Notary Public.*

My commission expires at the end of the next session of Senate.

STIPULATION.

(Filed April 24, 1930.)

It is hereby stipulated and agreed between David L. Ullman, attorney for the plaintiff, The Trainor Company, and Joseph W. Henderson, attorney for the defendant, The Aetna Casualty & Surety Company, that paragraph 3 of the statement of claim is admitted, and that said admission shall be considered as paragraph 3 of the affidavit of defense, and that paragraph 3 of the affidavit of defense as filed shall become paragraph 4, and each number thereafter shall accordingly be increased by one to the end thereof, and that the affidavit of defense as filed may be amended in accordance with this stipulation.

DAVID L. ULLMAN,
Attorney for Plaintiff.

J. W. HENDERSON,
Attorney for Defendant.

STIPULATION WAIVING TRIAL BY JURY.

(Filed October 30, 1930.)

It is stipulated and agreed between Ullman & Dicker, attorneys for plaintiff, and Joseph W. Henderson, attorney for defendant, that a jury trial being waived, the issues of fact in this case may be tried and determined by the Court without the intervention of a jury, in accordance with Section 773 of the Judicial Code in such cases made and provided.

ULLMAN & DICKER,
By DAVID L. ULLMAN,
Attorneys for Plaintiff.
(Sgd.) JOSEPH W. HENDERSON,
Attorney for Defendant.

Philadelphia, Pa., October 30, 1930.

OPINION

Sur Pleadings and Proofs.

(Filed February 13, 1931.)

KIRKPATRICK, *J.*

This is a suit by an obligee against the surety upon a bond for the completion of a building operation.

FINDINGS OF FACT.

1. The Trainor Company, plaintiff, on October 13, 1927, conveyed certain real estate to Copley Homes, Inc., a corporation organized to carry out a proposed house building operation. The details are unimportant but it may be taken

(a) that as a result of the transaction Copley Homes owed The Trainor Company $28,000;

(b) that this sum was a part of the purchase price of the real estate; and

(c) that it was all profit to The Trainor Company, accruing to it without any capital investment on its part, simply by turning the land over to Copley Homes at an advance over the price at which it was able to buy it for itself. This last fact was not disclosed to the defendant at any time prior to the execution of the bond in suit.

2. In order to finance its building operation, Copley Homes borrowed money from The Sun Mortgage Company and its subsidiary, Realty Bond and Finance Corporation, two corporations organized to finance building operations, giving to The Sun Mortgage Company as collateral security a separate first mortgage

of $4500 upon each of the fifty-two lots comprising the operation; and to Realty Bond and Finance Corporation, a blanket second mortgage of $88,000 covering the entire tract, which mortgage had a release clause of $2,000 per house. The amounts borrowed were less than the amounts of the mortgages placed and assigned as collateral security, so that the net result of the financing was, in substance and without entering into all of the details, that each of the lots had against it a first mortgage of $4,500 and what amounted to a second mortgage of $2,000, and that there was a small equity in the first mortgage (which may be disregarded) and an equity in the second mortgage over and above the amount borrowed upon it amounting to approximately $636 per lot. Copley Homes paid The Trainor Company the $28,000 due it by giving to The Trainor Co. its note for that amount and assigning to it as collateral the equity in the second mortgage.

3. On the day of the general settlement (October 13, 1927) the bond in suit was executed by Copley Homes as principal and The Aetna Casualty & Surety Company, the defendant, as surety. The obligees were The Land Title & Trust Company (through the medium of which The Sun Mortgage Company made its loan, and which was to act as its agent in handling the funds and paying contractors as the work progressed), Realty Bond and Finance Corporation and The Trainor Company, the plaintiff. The bond had three conditions the first of which was in substance "that, if within ten months within the date hereof each of the lots . . . shall be fully improved and completed with a building, together with the other improvements (such as paved streets, sidewalks, driveways, gas, water, sewerage, etc.), in keeping with and as shown by the aforesaid Plans, Specifications, and Conditions, Building Plats and Surveys, . . . THEN, in the event that all of the

above-and below-mentioned conditions are fully performed, this Bond shall be Void; otherwise it shall remain in full force and effect in law."

4. Copley Homes immediately began building 52 houses on the lots. On August 13, 1928, the date for completion fixed by the bond, 24 houses had been fully completed. The remaining 28 were not far from completion, but sufficient work remained to be done upon them to require a finding (and I so find) that they had not been completed in accordance with the plans and specifications either fully or substantially.

5. Neither the plaintiff nor Copley Homes nor the defendant ever completed the operation. It was, however, ultimately completed on December 27, 1929 by the Sun Mortgage Company, holder of the first mortgages.

6. The value of the 28 uncompleted houses, as of August 13, 1928, was $6,700 each. This amount is in excess of the sum of the amount of the plaintiff's mortgage on each house and all prior liens. In arriving at this value, in addition to the testimony of expert witnesses, the following facts were considered and may be taken as found:

(a) The work actually remaining to be done consisted principally of installation of plumbing accessories such as spigots and shower curtains and rods, painting (which was about 75% complete), papering, installation of gas ranges and minor details in connection with carpenter work, plastering and brick work. The record of work remaining to be done made by the representative of the Land Title Company about August 13, 1928 is accepted as substantially correct.

(b) The original contract price for full completion of all the houses amounted to about $4200 for each

house, (disregarding the slightly larger price for the corner houses). This was the price of building and did not include cost of land or financing.

(c) The price of the land without the houses to The Trainor Company was $76,000 or about $1,461 for each lot, and to Copley Homes $104,000 or $2,000 for each lot.

(d) Subsequent to August 13, 1928, the total sum of $26,071 was spent in completing the operation. Of this amount $4,000 went for street improvements and the balance or $22,071 was spent in completing the houses. This would amount to approximately $788 for each house. How much of the total amount as expended went for work contracted for or actually installed prior to August 13, 1928, the testimony does not disclose. In addition, it is probable that some of the expenditures went for repairs to or replacement of work already done, since an operation which is allowed to stand uncompleted for so long a period is bound to deteriorate to some extent. It is also probable that the amount spent for completion under the new contract represents a smaller proportion of the whole work than an equal amount in the original contract price would have represented.

(e) Twenty of the completed houses were sold for the price of $7,950 each, ten before August 13, 1928, and ten after. The plaintiff concedes that the completed houses as of that date were worth $7,950 each.

(f) During 1928, 1929, and 1930 the value of real estate generally and in the locality in which this operation was, declined steadily.

7. On July 24, 1929, 28 houses being still uncompleted, the defendant made an agreement with The Sun

Mortgage Company which effected the settlement of a number of matters arising out of various surety bonds which the defendant had written for operations in which The Sun Mortgage Company and its subsidiaries were interested, including the Copley Homes operation. One of the terms of that agreement was that The Sun Mortgage Company would complete the Copley Homes operation in accordance with plans and specifications. Thereafter The Sun Mortgage Company did complete the operation, as has been found. In entering into the settlement and in completing the houses The Sun Mortgage Company did not act as agent or in any other capacity for the plaintiff.

8. On January 25, 1930 The Sun Mortgage Company foreclosed its first mortgages buying in all the properties for the sum of $50 and thus wiping out the second blanket mortgage of The Realty Bond and Mortgage Company and the equity of The Trainor Company therein.

9. The plaintiff has received $13,026.02 from Copley Homes on account of its obligation to pay $28,000.

CONCLUSIONS OF LAW.

1. The bond is a bond of guaranty and, there having been a breach, the plaintiff is entitled to judgment.

2. The measure of damages in this case is so much of the difference between the value of the property as of August 13, 1928, with the houses uncompleted, and the value it would have had on that date had the houses been completed as would have been necessary to pay the plaintiff's mortgage debt as well as all prior liens. Since the value of the property as of August 13, 1928 was more than the sum of the plaintiff's mortgage and

prior liens the plaintiff is not entitled to any substantial damages.

3. The plaintiff was not bound to disclose to the defendant the fact that the $28,000 of purchase price owing to it by Copley Homes represented profit made by it without capital investment and arising from merely increasing the price of land which it was in a position to acquire at a lower figure.

4. The so-called settlement agreement of July 24, 1929, had no effect whatever upon the legal rights of the parties so far as they are involved in this suit.

DISCUSSION.

The first question is as to the measure of damages. In order to reach the essence of this question the facts found may be condensed into the following statement:

The plaintiff is the obligee upon a bond given by the owner of certain real estate, the condition of which is that a building operation thereon will be completed by a certain date. The plaintiff's interest in the property consists of what amounts to a third mortgage. The buildings were only partially completed on the day for completion. The property with the operation in its uncompleted state on that day had a value which exceeded the sum of the plaintiff's mortgage and prior liens.

The defendant's position is that, since the value of the property when the breach occurred was sufficient to cover the plaintiff's third mortgage and all prior liens, the plaintiff is entitled to nominal damages only. The plaintiff's position is that, regardless of the relation between the value of the property with the uncompleted operation on it and the amount of its mortgage and prior liens, it is entitled to recover the difference between the value of the property as it was at the time of the breach and as it would have been had the build-

ings been fully completed in accordance with the contract on that day. It may be noted that, in spite of this contention, the plaintiff in his statement claims only so much of the difference as will, with what he has been paid, equal the amount of the money due it and secured by its mortgage.

In fixing the amount of money damages for breach of contract the general purpose of the law is to give compensation—that is, to put the injured party in as good a position as he would have been if the party in default had kept his contract. A limitation upon this rule is that the plaintiff may not ordinarily recover compensation for injurious consequences of the breach which he might reasonably have avoided. Implicit in the rule is the policy of the law that a plaintiff may not through the medium of damages improve his position beyond his injury, or make a profit from the defendant's fault or misfortune.

Applied to building contracts these general principles allow the owner of the land, in case of a default by the builder, after partial performance, to recover the difference between the value of his property with the building in its uncompleted state and its value as it would have been had the contract been fully performed. Or, if completion is reasonably possible and does not involve unnecessary economic waste, then as a method of ascertaining his damages he may complete the building at his own expense, and recover the reasonable cost of so doing. In either case if the builder has given bond the owner's recovery against the surety would be the same as against the principal.

A mortgagee of land upon which buildings are to be erected is, however, not in the same position as the owner. Except as it affects the security for his loan he has no genuine interest in the completion of the work. Obviously, the contention of the plaintiff in this case that the mortgagee like the owner is entitled to the

difference in the value of the completed and the uncompleted job regardless of the value of the land or the amount of the mortgage is unsound. If that were so, the holder of a mortgage secured ten times over by the value of the land alone and having no other interest, could recover from a surety large damages for the breach of a contract to build an expensive structure upon it. The fundamental principles and policy of the law above stated forbid such result.

True, there are cases in which mortgagees or their insurers have at their own expense completed the contract and been allowed the cost of so doing. Among these are Equitable Trust Company v. National Surety Company, 214 Pa. 159, and Zane v. Citizens Trust Company, 117 Fed. 814 (C. C. A. 3d). In both of these cases, however, if the facts be carefully considered, it will be seen that the value of the mortgage was impaired or threatened by failure to complete. In the Equitable Trust Company case the completion by the obligee at its own expense of the contract of a sub-contractor guaranteed by the surety was the means by which the ultimate damages were in all probability greatly reduced, since thus the disorganization of the whole operation and consequent extensive loss were avoided. In Zane v. Citizens Trust Company, it is clear that the default impaired the value of the mortgage more than the penalty of the bond, which was the amount recovered. Even if the cost of completion should be in excess of the loss to the mortgagee, the mortgagee would not profit, since the buildings go upon the land of another and all that he gets in security for his debt. In such case, the only question that might be raised would be whether completion by the mortgagee would result in unnecessarily increasing the damages to the defendant.

In the case at hand, however, we have a mortgagee who has elected not to complete but who has sued for money damages. Parenthetically, it may be said that

the operation never was completed by either of the original parties so that the question whether time is of the essence does not enter into the case. Under the rule of compensation the mortgagee can recover only to the extent that his interest in the subject matter has been adversely affected by the breach. The weight of authority is to the effect that that is the amount by which the value of his mortgage has been impaired. Specifically, the amount is to be ascertained by finding the difference between the value of the houses as they were uncompleted at the time of the breach and their value as of that time if they had been then completed in accordance with the contract and allowing so much of this difference as, added to the uncompleted value, would equal the amount of the mortgage.

In Norway Plains Savings Bank v. Moors, 134 Mass. 129, a case of a guaranty bond, on all fours with the instant case, the court said: "The measure of damages is the difference between the value of the houses as they were in fact built, and the value they would have had if built in conformity to the agreement, or so much of this difference as would have been necessary, with the value of the houses as built, to have paid the mortgage debt and interest then due; . . ." And the court goes on to say that the time for determining these values was the time when the plaintiff did know or should with reasonable diligence have known of the breach.

In Province Securities Corporation v. Maryland Casualty Company (Mass.), 168 N. E. 252, the court said: "Except that as the mortgagee holds the property for security only he cannot recover more than the difference between the value of the property in the condition in which it is left and the amount due on his mortgage." The case was reversed, not because the court below had adopted an incorrect measure of damages but because it accepted the price at the foreclosure sale as conclusive of the value at the time of the breach.

In the latter case the bond was an indemnity bond and not an absolute guarantee of completion. The plaintiff has made much of the distinction between these two classes of bonds but so far as I can see there is no substantial difference in the measure of the damages. In the one case it is compensation measured by anticipated loss, in the other actual loss. In the case of a guaranty bond the right of action accrues upon the breach. In the case of an indemnity bond the plaintiff has no right of action until he actually has incurred a money loss, or in other words; on a guaranty bond he must show loss or else be limited to nominal damages, while on an indemnity bond, if he fails to show loss he will be out of court altogether.

Two New York cases (Kidd v. McCormick, 83 N. Y. 391, and Sachs v. American Surety Company, 72 N. Y. App. Div. 60, 76 N. Y. Supp. 355) appear to state the rule as though the mortgagee is not limited by the extent of his interest, but it will be seen by reference to the later case of Swartz v. Ainwell Company, 227 N. Y. 184, that the principle of damages for compensation only has not been disregarded. That case was a suit upon a bond of guaranty and it was held that the complaint, which did not set forth loss to the plaintiff, failed to state a cause of action. The same is true of United Real Estate Company v. McDonald, 140 Mo. 605, 41 So. W. 913. The point involved there was the failure of the plaintiff to show any difference between the work, completed and uncompleted, and what was said as to the measure of damages was necessarily dictum. In Stuart v. Carter, 79 W. Va. 92, 70 So. E. 537, the only question was whether the plaintiff could sue on a guaranty bond before he had actually paid liens against the property, and, since he had sued to recover only the amount of the lien, the measure of damages was not involved.

In Folz v. Tradesmen's Trust etc. Company, 201 Pa. 583, a suit on a bond of guaranty, the plaintiff had

loaned the principal money to finance his contract with the city, and held no mortgage or other lien. After default the *surety* completed the contract. The recovery was for the amount of the bond but, by reference to the earlier case of Folz v. Amweg, 191 Pa. 157, it will be seen that that was also the amount borrowed. It is also evident that, because of his default, the contractor was wholly unable to pay the plaintiff. In other words the plaintiff's recovery was the amount of his loss. The referee said (p. 588) that whichever way the case was decided "the losing party suffers a loss equal to the amount of the judgment". The value of the work in its uncompleted state is nowhere considered or mentioned, nor is it material, since the plaintiff had no lien.

A somewhat similar situation was presented in Union Trust Company v. Citizens' Trust Company, 185 Pa. 217. In that case the plaintiff was the owner of the ground. It loaned a contractor $2000 which was to be used for building two houses on the land, and took an indemnity bond with the defendant as surety to protect it against loss. The fact that the plaintiff raised the money by means of mortgages on the land is immaterial. The plaintiff's position was not that of a mortgagee but of an owner who had loaned money to the contractor. The damages allowed were the penalty of the bond which represented the plaintiff's actual loss. The court rejected the defendant's offer to show the value of the lots. Obviously this was not a relevant fact since the plaintiff was not the holder of a debt secured by the land, and his loss was the money loaned to the contractor which had nothing to do with the land.

But the plaintiff argues that the mortgagee's interest in the subject matter is not necessarily measured by the face value of his mortgage, that he has contracted for a mortgage secured by an adequate margin, that so secured his mortgage might conceiv-

ably in times of cheap money be worth a premium, and that for these reasons he is entitled to the full amount necessary to bring the property up to the value it would have had had the houses been completed, regardless of the amount of his mortgage. This argument has some merit. The trouble is that it is utterly impossible to do more than guess at an amount which will compensate the plaintiff upon this theory, or to avoid enriching him at the defendant's expense. Thus if we should say that a mortgage ought to be secured by a margin of safety of forty per cent. and allow him that amount as damages, the plaintiff, in a case in which the value of the property just equals the amount of the mortgage, might subsequently foreclose and have his original investment back plus a profit of forty per cent. already allowed as damages. Considerations of this nature no doubt have moved the courts to limit the plaintiff to so much of the difference in the value of the completed and uncompleted operation as will bring his mortgage up to its face value. In German-American Title etc. Company v. Citizens' Trust etc. Company, 190 Pa. 247, the plaintiff's interest consisted of a ground rent. The measure of damages approved by the court in that case (the loss in the market value of the ground rents due to the failure to complete the buildings) obviously arose from the necessities of the situation. The general rule could not well be applied since the plaintiff's lien did not have any face or principal value. There is no suggestion that the rule stated was intended to apply to anything other than ground rents, and (as applied to the facts of the instant case) the difficulties in the way of arriving at a fair market value for third mortgages secured by a margin, comparatively narrow at best, are obvious.

The fact in the instant case that nearly a year and a half after the breach the holder of the first mort-

gages foreclosed and wiped out the plaintiff's security does not affect the situation. Default in the first mortgages might have occurred at any time, even before the completion date. Even assuming that the houses had been completed in accordance with the contract, it is problematical whether, in the event of a default, it would have been wise for the plaintiff to have protected itself by bidding the amount of all the liens. Moreover any number of things totally unconnected with the building operation or with the failure to complete the houses and not reasonably to be foreseen at the time of the giving of the bond might have intervened to depress the value of the property by the time the foreclosure took place. If the value of the property had suddenly increased after the breach, no one would suggest that such fact would affect the plaintiff's right to damages. The plaintiff could have completed and held the defendant for the cost. Zane v. Citizens Trust Company, supra. It did not elect to do so and very likely, in view of its position, would have gained nothing if it had. In such case the only sound and practically applicable measure of damages is that adopted by the courts as set forth herein.

The conclusions reached as to the measure of damages make it unnecessary to discuss in detail the other defenses raised. I have disposed of them in the findings of fact and conclusions of law. The breach being proved the plaintiff will be entitled to nominal damages and I therefore find for the plaintiff and fix the damages at $5.00.

Judgment may be entered accordingly.

By THE COURT:

W. H. KIRKPATRICK, *J.*

MOTION FOR NEW TRIAL.

(Filed February 17, 1931.)

And Now, to-wit, February 17, 1931, the plaintiff moves the Court for a new trial and in support of its motion, assigns the following reasons:

1. Verdict was against the evidence.

2. Verdict was against the weight of the evidence.

3. Verdict was against the law.

4. The learned Court erred in finding in its fourth finding of fact as follows:

> "On August 13, 1928, the date for completion fixed by the bond, 24 houses had been fully completed."

5. The learned Court erred in finding in its sixth finding of fact as follows:

> "The value of the 28 uncompleted houses, as of August 13, 1928 was $6700.00 each."

6. The learned Court erred in finding as fact its finding 6A as follows:

> "The work actually remaining to be done consisted principally of installation of plumbing accessories such as spigots and shower curtains and rods, painting (which was about 75% complete), papering, installation of gas ranges and minor details in connection with carpenter work, plastering and brick work. The record of work remaining to be done made by the representative of the Land Title Company about August 13, 1928 is accepted as substantially correct."

7. The learned Court erred in finding as fact its finding 6D as follows:

"Subsequent to August 13, 1928, the total sum of $26,071 was spent in completing the operating. Of this amount $4000. went for street improvements and the balance or $22,071 was spent in completing the houses. This would amount to approximately $788 for each house. How much of the total amount as expended went for work contracted for or actually installed prior to August 13, 1928, the testimony does not disclose. In addition, it is probable that some of the expenditures went for repairs to or replacement of work already done, since an operation which is allowed to stand uncompleted for so long a period is bound to deteriorate to some extent. It is also probable that the amount spent for completion under the new contract represents a smaller proportion of the whole work than an equal amount in the original contract price would have represented."

8. The learned Court erred in finding as a fact its finding number 9, as follows:

"The plaintiff has received $13,026.02 from Copley Homes on account of its obligation to pay $28,000."

in that the obligation to Copley Homes was to pay $28,000 with interest of 6 per cent. from October 13, 1927.

9. The learned Court erred in finding as its second conclusion of law:

"The measure of damages in this case is so much of the difference between the value of the property as of August 13, 1928 with the houses uncompleted, and the value it would have had on that date had the houses been completed as would have been necessary to pay the plaintiff's mortgage debt as well as all prior liens. Since the value of the property as of August 13, 1928 was more than the sum of the plaintiff mortgage and prior liens the plaintiff is not entitled to any substantial damages."

10. The plaintiff also assigns in support of its motion for a new trial the failure of the learned Court to affirm such of its requests for findings of fact and conclusions of law as the learned Court may decline.

DAVID L. ULLMAN, ESQ.,
Attorney for Plaintiff.

MEMORANDUM OPINION

Sur Motion for a New Trial.

(Filed June 19, 1931.)

Denied.

By THE COURT:

W. H. KIRKPATRICK, *J.*

PLAINTIFF'S MOTION FOR JUDGMENT ON THE RECORD.

(Filed February 17, 1931.)

AND Now, to-wit: on the seventeenth day of February A. D. 1931, comes the plaintiff and moves the Court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record and that judgment be entered upon the record in favor of the plaintiff in the sum of $19,453.98.

DAVID L. ULLMAN, ESQ.,
Attorney for Plaintiff.

October 31, 1931.
Denied.
(Sgd.) W. H. KIRKPATRICK,
J.

PRÆCIPE TO ENTER JUDGMENT.

(Filed December 1, 1931.)

To the Clerk:

Kindly enter judgment on the finding in the above-entitled matter.

(Sgd.) DAVID L. ULLMAN,
Attorney for Plaintiff.

December 1, 1931.

JUDGMENT.

(Filed December 1, 1931.)

Before KIRKPATRICK, *J.*

And now, December 1, 1931, in accordance with the opinion of the Court, and by præcipe filed, judgment in the sum of five dollars is hereby entered in favor of plaintiff and against the defendant, The Aetna Casualty & Surety Company.

By THE COURT:

Attest: E. G. JOHNSON,
Deputy Clerk.

BILL OF EXCEPTIONS.

(Filed December 1, 1931.)

This cause came on for trial before the Honorable William H. Kirkpatrick on November 5, 1930 (a stipulation to try the case before the Court without a jury having been executed by counsel and filed of record) and the following proceedings were had, to wit:

November 5, 1930, the case was tried before the Court without a jury on pleadings and proofs;

December 19, 1930, argument on the record was made before the Court by counsel;

February 13, 1931, the learned trial Judge filed an opinion granting leave to enter judgment in the sum of $5 for plaintiff;

February 17, 1931, plaintiff's motion for new trial filed;

February 17, 1931, plaintiff's motion for judgment on the record filed;

June 19, 1931, order of Court denying motion for new trial filed.

September 2, 1931, præcipe to enter judgment filed;

September 2, 1931, judgment in favor of plaintiff in the sum of $5 filed;

October 21, 1931, order of Court denying motion for judgment on the record filed;

December 1, 1931, præcipe to enter judgment filed;

December 1, 1931, judgment in favor of plaintiff in the sum of $5 filed.

1. Plaintiff excepts to the refusal of the learned trial Judge to affirm the following conclusions of law:

> "The measure of damages for the breach of a bond guaranteeing the performance of a certain act such as the bond in suit is the difference in value between the thing that was guaranteed to

be done, to wit, the houses completed in accordance with the plans and specifications and the value of the thing which was in fact done, to wit houses in the condition in which they were on August 13, 1928, or so much thereof, since the bond runs to the plaintiff as mortgagee, as is required to pay the unpaid balance of principal, and interest in full, not exceeding however the amount of the bond.

2. Plaintiff excepts to the following conclusion of law in the opinion of the learned trial Judge:

"The measure of damages in this case is so much of the difference between the value of the property as of August 13, 1928, with the houses uncompleted, and the value it would have had on that date had the houses been completed as would have been necessary to pay the plaintiff's mortgage debt as well as all prior liens. Since the value of the property as of August 13, 1928 was more than the sum of the plaintiff's mortgage and prior liens the plaintiff is not entitled to any substantial damages."

3. Plaintiff excepts to the following conclusion of law in the opinion of the learned trial Judge:

"February 13, 1931, leave is granted to the plaintiff to enter judgment in the sum of $5.00."

4. Plaintiff excepts to the following conclusion of law in the opinion of the learned trial Judge:

"In the case of a guaranty bond the right of action acrues upon the breach. In the case of an indemnity bond the plaintiff has no right of action until he actually has incurred a money loss, or in other words, on a guaranty bond he must show loss or else be limited to nominal damages, while on an indemnity bond, if he fails to show loss he will be out of court altogether."

5. Plaintiff excepts to the following conclusion of law in the opinion of the learned trial Judge:

"Under the rule of compensation the mortgagee can only recover to the extent that his interest in the subject matter has been adversely affected by the breach. The weight of authority is to the effect that that is the amount by which the value of his mortgage has been impaired. Specifically, the amount is to be ascertained by finding the difference between the value of the houses as they were uncompleted at the time of the breach and their value as of that time had they been then completed in accordance with the contract and allowing so much of this difference as, added to the uncompleted value, would equal the amount of the mortgage."

6. Plaintiff excepts to the action of the Court as follows:

"Sur Motion for New Trial. Denied. By the Court William H. Kirkpatrick, J. June 19, 1931."

7. Plaintiff excepts to the action of the Court as follows:

"Motion for Judgment on the Record:

And now, to wit, on the 17th day of February A. D. 1931, comes the plaintiff and moves the Court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record and that judgment be entered upon the record in favor of the plaintiff in the sum of $19,453.98.

October 21, 1931. Denied. William H. Kirkpatrick, J."

8. Plaintiff excepts to the action of the Court in entering judgment in favor of the plaintiff and against the defendant as follows:

"Before Kirkpatrick, J. And now, September 2, 1931 in accordance with the Opinion of the Court, and by præcipe filed, Judgment in the sum of Five Dollars is hereby entered in favor of the plaintiff

and against the defendant, The Aetna Casualty & Surety Company. By the Court Attest: E. G. Johnson, Deputy Clerk."

9. Plaintiff excepts to the action of the Court in entering judgment in favor of the plaintiff and against the defendant as follows:

"Before Kirkpatrick, J. And now, December 1, 1931 in accordance with the Opinion of the Court and by præcipe filed, Judgment in the sum of Five Dollars is hereby entered in favor of plaintiff and against the defendant, The Aetna Casualty & Surety Company. By the Court Attest: E. G. Johnson, Deputy Clerk."

And Now in furtherance of justice and that right may be done the plaintiff, the said plaintiff enters and presents the foregoing as a bill of exceptions in this case to the act of the Court and prays that same may be settled and allowed and filed and sealed by the Court and made a part of the record and the said be and hereby accordingly is done this first day of December, A. D. 1931.

THE TRAINOR COMPANY.

By Edward E. Dicker,
Secretary,
Appellant.

David L. Ullman,
Attorney for Appellant.

CERTIFICATION OF JUDGE TO BILL OF EXCEPTIONS.

Thereafter on the first day of December, A. D. 1931, and within the time allowed by the United States District Court for the Eastern District of Pennsylvania, the plaintiff duly tendered this its bill of exceptions herein which, having been seen and examined by the Court and counsel is by the Court allowed and approved, and the said bill of exceptions is signed and sealed by the Honorable William H. Kirkpatrick, the Judge of the said Court before whom said proceedings were had and the same is ordered by the said Court to be filed and made part of the record herein which is now accordingly done.

Given under the hand and seal of the Judge of this said Court before whom the said proceedings were held this first day of December, A. D. 1931.

W. H. KIRKPATRICK, *J.*

The above and foregoing bill of exceptions is hereby approved.

ULLMAN & DICKER.
By DAVID L. ULLMAN,
Attorney for Plaintiff.
JOSEPH W. HENDERSON,
Attorney for Defendant.

PETITION FOR APPEAL.

(Filed December 1, 1931.)

To the Honorable William H. Kirkpatrick, Judge of the United States District Court for the Eastern District of Pennsylvania:

THE TRAINOR COMPANY, a corporation organized and existing under the laws of the State of Delaware, your petitioner, which is the plaintiff in the above-entitled case, prays that it may be permitted to take an appeal from the order dismissing its motion for a new trial, entered June 19, 1931, and from the order denying its motion for judgment on the record in favor of the plaintiff in the sum of $19,453.98 and from judgment on the findings in its favor for the sum of $5 entered by defendant on September 2, 1931, and by plaintiff on December 1, 1931, to the United States Circuit Court of Appeals for the Third Circuit, for the reasons specified in the assignments of error which is filed herewith.

And your petitioner prays that an order be made fixing the amount of security for costs which said Trainor Company shall give and furnish upon such appeal.

DAVID L. ULLMAN,
Attorney for Petitioner,
The Trainor Company.

December 1, 1931.

ORDER ALLOWING APPEAL.

(Filed December 1, 1931.)

The petition of the TRAINOR COMPANY, plaintiff in the above-entitled case, from an appeal from the final judgment on the finding, is hereby granted and the appeal is allowed; and petitioner shall file a bond in the sum of $250 for costs with sufficient sureties and conditioned as required by law.

It is further ORDERED that a certified transcript of the record and all proceedings be transmitted to the Circuit Court of Appeals for the Third Circuit.

W. H. KIRKPATRICK,
District Judge.

December 1, 1931.

ASSIGNMENTS OF ERROR.

(Filed December 7, 1931.)

AND NOW, to wit, this seventh day of December, 1931, comes the plaintiff in the above-entitled cause and files the following assignments of error upon which it will rely in the prosecution of its appeal, in the above-entitled cause, from final judgment made by your Honorable Court on the first day of December, 1931:

1. The learned Court erred in refusing to affirm the following conclusions of law:

> "The measure of damages for the breach of a bond guaranteeing the performance of a certain act such as the bond in suit is the difference in value between the thing that was guaranteed to be done, to wit, the houses completed in accordance with the plans and specifications and the value of the thing

which was in fact done, to wit houses in the condition in which they were on August 13, 1928, or so much thereof, since the bond runs to the plaintiff as mortgagee, as is required to pay the unpaid balance of principal, and interest in full, not exceeding however the amount of the bond."

2. The learned Court erred in making the following conclusion of law in its opinion:

"The measure of damages in this case is so much of the difference between the value of the property as of August 13, 1928, with the houses uncompleted, and the value it would have had on that date had the houses been completed as would have been necessary to pay the plaintiff's mortgage debt as well as all prior liens. Since the value of the property as of August 13, 1928 was more than the sum of the plaintiff's mortgage and prior liens the plaintiff is not entitled to any substantial damages."

3. The learned trial Judge erred in making the following conclusion of law in his opinion:

"February 13, 1931 leave is granted to the plaintiff to enter judgment in the sum of $5.00."

4. The learned Court erred in making the following conclusion of law in its opinion:

"In the case of a guaranty bond the right of action accrues upon the breach. In the case of an indemnity bond the plaintiff has no right of action until he actually has incurred a money loss, or in other words, on a guaranty bond he must show loss or else be limited to nominal damages, while on an indemnity bond, if he fails to show loss he will be out of court altogether."

5. The learned Court erred in making the following conclusion of law in its opinion:

"Under the rule of compensation the mortgagee can only recover to the extent that his interest in the subject matter has been adversely af-

fected by the breach. The weight of authority is to the effect that that is the amount by which the value of his mortgage has been impaired. Specifically, the amount is to be ascertained by finding the difference between the value of the houses as they were uncompleted at the time of the breach and their value as of that time had they been then completed in accordance with the contract and allowing so much of this difference as, added to the uncompleted value, would equal the amount of the mortgage."

6. The learned Court erred in dismissing plaintiff's motion for a new trial:

"Sur Motion for New Trial. Denied. By the Court William H. Kirkpatrick, J. June 19, 1931."

7. The learned Court erred in dismissing plaintiff's motion for judgment on the record:

"Motion for Judgment on the Record:

"And now, to wit, on the 17th day of February A. D. 1931 comes the plaintiff and moves the Court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record and that judgment be entered upon the record in favor of the plaintiff in the sum of $19,453.98.

"October 21, 1931. Denied. William H. Kirkpatrick, J."

8. The learned Court erred in entering judgment in favor of the plaintiff and against the defendant as follows:

"Before Kirkpatrick, J. And now, December 1, 1931 in accordance with the Opinion of the Court and by præcipe filed, Judgment in the sum of Five Dollars is hereby entered in favor of plaintiff and against the defendant, The Aetna Casualty & Surety Company. By the Court. Attest: E. G. Johnson, eputy Clerk."

DAVID L. ULLMAN,
Attorney for Plaintiff—
the Appellant.

PRÆCIPE OF PORTION OF RECORD TO BE FILED IN CIRCUIT COURT OF APPEALS.

(Filed December 31, 1931.)

Clerk, U. S. District Court:

Please make and transmit under the Land and seal of the District Court of the United States for the Eastern District of Pennsylvania to the Circuit Court of Appeals for the Third Circuit, the following portions of the record in the above-entitled case:

1. Docket entries.
2. Statement of claim.
3. Affidavit of defense and new matter.
4. Plaintiff's reply to new matter.
5. Stipulation of Counsel.
6. Stipulation waiving trial by jury.
7. Opinion of Court sur pleadings and proofs.
8. Motion for new trial.
9. Dismissal of motion for new trial.
10. Motion for judgment on record and action thereon.
11. Præcipe to enter judgment.
12. Entry of judgment.
13. Bill of exceptions and certification thereof.

14. Petition for appeal.

15. Assignments of error.

16. Præcipe for transcript of record.

17. Clerk's certificate.

(Sgd.) DAVID L. ULLMAN,
Attorney for Plaintiff.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.:*

I, GEORGE BRODBECK, clerk of the United States District Court in and for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and full copy of the original so much of the pleas and proceedings, in the case of The Trainor Company v. The Aetna Casualty & Surety Company, No. 15318, March Term, 1930, as per per præcipe filed, a copy of which is hereto annexed, the transcript of record in the above-entitled case is to include, and now remaining among the records of the said court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of
(Seal) of the aforesaid Court at Philadelphia, this sixteenth day of May, A. D. 1932.

GEORGE BRODBECK,
Clerk.

ORDER AFFIRMING JUDGMENT.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT.

No. 4568. March Term, 1932.

The Trainor Company,

Appellant,

v.

The Aetna Casualty & Surety Company,

Appellee.

And afterwards, to wit, the ninth day of June, 1932, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable Victor B. Woolley and Honorable J. Whitaker Thompson, *Circuit Judges,* and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the twenty-first day of December, 1932, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

No. 4568. March Term, 1932.

THE TRAINOR COMPANY,

Plaintiff-Appellant,

v.

THE AETNA CASUALTY AND SURETY COMPANY,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

OPINION.

(Filed December 21, 1932.)

Before BUFFINGTON, WOOLLEY and THOMPSON, *Circuit Judges.*

BUFFINGTON, *J.*

In the Court below The Trainor Company (hereafter called Trainor) brought suit against The Aetna Casualty and Surety Company (hereafter called Aetna) upon a bond given to Trainor and others by Aetna and others, which bond Trainor claimed, so far as it concerned it, was breached. Jury was waived. The Court made findings of fact, among which was that the bond had been breached and Trainor was entitled

to damages, but it further found such damage was nominal. It therefore entered judgment in favor of Trainor for five dollars. Thereupon Trainor took this appeal.

As all aspects of this somewhat complicated case are recited and can be seen in the opinion of the trial Judge at 49 Fed. (2d) 769, we refrain from needless restatement and detail discussion, for the facts of the case here pertinent were established by the findings of the Judge sitting as a jury and are not reviewable and the only question now involved is whether on the facts so found, the Court committed error in awarding Trainor mere nominal damages.

By the recitals of the bond Trainor "is to have the equity in the said Fifty-two mortgages subject to and above" certain other claims, etc. And the condition of the bond was, "That, if within ten months from the date hereof each of the lots or premises described in each of the said Fifty-two First Mortgages shall be fully improved and completed with a building, together with the other improvements (such as paved streets, sidewalks, driveways, gas, water, sewerage, etc.), in keeping with and as shown by the aforesaid Plans, Specifications and Conditions, Building Plats and Surveys . . . . Then, in the event that all of the above and below mentioned conditions are fully performed, this Bond shall be void, otherwise, it shall remain in full force and effect in law."

Being dated October 13, 1927, Aetna's obligation called for August 13, 1928 as the date for complying therewith. The then status was found by the Court as follows: "On August 13, 1928, the date for completion fixed by the bond, 24 houses had been fully completed. The remaining 28 were not far from completion, but sufficient work remained to be done upon them to require a finding (and I so find) that they had not been

completed in accordance with the plans and specifications either fully or substantially. . . . The value of the 28 uncompleted houses, as of August 13, 1928, was $6,700 each. This amount is in excess of the sum of the amount of the plaintiff's mortgage on each house and all prior liens. . . . During 1928, 1929, and 1930 the value of real estate generally and in the locality in which this operation was, declined steadily. . . . On January 25, 1930 The Sun Mortgage Company foreclosed its first mortgages buying in all the properties for the sum of $50 and thus wiping out the . . . equity of The Trainor Company therein."

Upon these facts the trial Court held: "The measure of damages in this case is so much of the difference between the value of the property as of August 13, 1928, with the houses uncompleted, and the value it would have had on that date had the houses been completed as would have been necessary to pay the plaintiff's mortgage debt as well as all prior liens. Since the value of the property as of August 13, 1928 was more than the sum of the plaintiff's mortgage and prior liens the plaintiff is not entitled to any substantial damages." Was it in error in so holding?

The trial Judge, after stating the law as to the rights of a land owner against a builder where the latter fails to complete, and calling to attention that the present case is not one of an owner but of a mortgagee, says: "A mortgagee of land upon which buildings are to be erected is, however, not in the same position as the owner. Except as it affects the security for his loan he has no genuine interest in the completion of the work. Obviously, the contention of the plaintiff in this case that the mortgagee like the owner is entitled to the difference in the value of the completed and uncompleted job regardless of the value of the land or the amount of the mortgage is unsound. If that were so, the holder of a mortgage secured ten times over by

the value of the land alone and having no other interest, could recover from a surety large damages for the breach of a contract to build an expensive structure upon it. The fundamental principle and policy of the law above stated forbid such result. . . . The fact in the instant case that nearly a year and a half after the breach the holder of the first mortgages foreclosed and wiped out the plaintiff's security does not affect the situation. . . . Moreover any number of things totally unconnected with the building operation or with the failure to complete the houses and not reasonably to be foreseen at the time of the giving of the bond might have intervened to depress the value of the property by the time the foreclosure took place. If the value of the property had suddenly increased after the breach, no one would suggest that such fact would affect the plaintiff's right to damages."

The cases bearing on the question here involved have in the main been so fairly and fully discussed in the trial Judge's opinion as to necessitate no further analysis. We have not overlooked the case of Purdy v. Massey, 306 Pa. 288, subsequent to the case in hand, and where there will be found a full discussion of the opposing views in the majority and dissenting opinions.

It is urged that the law of Purdy v. Massey is local to the Commonwealth of Pennsylvania where the contract in suit was intended to be performed and that, being local law, federal courts are bound to follow it, relying, evidently, upon Lubriko Co. v. Wyman, 290 Fed. 12, 17. The expression in that case was but a compressed statement of the law more fully stated by this court in Snare & Triest Co. v. Friedman, 169 Fed. 1, 10, 11, 12, and expressly based on Swift v. Tyson, 16 Peters 1, 8; 10 L. Ed. 865.

We do not regard the decision in Purdy v. Massey as creating a new local law of Pennsylvania but that,

at most, it declared the common law of that state (as those terms are used in the two decisions last cited) with respect not to property but to the subject of suretyship, which from its very nature is general law running, like commercial law, broadly through all the states. In such case "where the common law of the state is derived from the principles of general jurisprudence common to all the states" a federal court may (as we have done) exercise an independent judgment as to what is the law without respect to the decision of the state court as binding authority.

We are of opinion the Court below committed no error in holding that when on August 13, 1928, Trainor's mortgage was protected and, therefore, it committed no error in restricting the judgment to nominal damages.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

ORDER AFFIRMING JUDGMENT WITH COSTS.

(Filed December 21, 1932.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT.

No. 4568. March Term, 1932.

The Trainor Company,
Appellant,

v.

The Aetna Casualty & Surety Company,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia,
December 21, 1932.

Per Curiam,
BUFFINGTON,
Circuit Judge.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *Sct.:*
THIRD JUDICIAL CIRCUIT,

I, William P. Rowland, clerk of the United States Circuit Court of Appeals, for the Third Circuit, Do HEREBY CERTIFY the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this court in the case of The Trainor Company, Appellant, v. The Aetna Casualty & Surety Company, Appellee, No. 4568, on file, and now remaining among the records of the said court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this eighteenth day of March, in the year of our Lord one thousand nine hundred and thirty-three and of the Independence of the United States the one hundred and fifty-seventh.

(Seal)

WILLIAM P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 24, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3765)

INDEX TO PETITION.

	Page
Origin and Nature of the Case	1
The Questions Involved	6
Reasons for Granting the Writ	7
Certificate of Counsel	9

CASES CITED

Mechanics Trust Co. v. Fidelity and Casualty Co., 304 Pa. 526, 535	4, 5
Purdy v. Massey, 306 Pa. 288	4

INDEX TO BRIEF.

	Page
Opinions Below	11
Jurisdiction	11
Statement	12
Specification of Errors	12
Argument	14
Conclusion	29

CASES CITED.

Page

Belloni v. Freeborn, 63 N. Y. 383 16
Board of Education v. Maryland Casualty Co., 27 F. (2d) 20 (C. C. A. 3d) 23, 24
Community Building v. Maryland Casualty Co., 8 Fed. (2d) 678 21
Cudaback v. Hay, 134 Fed. 120 ..... 16, 21
Equitable Trust Co. v. National Surety Co., 214 Pa. 159 16
Kidd v. McCormick, 83 N. Y. 391 ..... 16, 19, 27, 29
McLain v. Provident Saving Life Assurance Society of New York, 110 Fed. 80, 91 23
Mechanics Trust Co. v. Fidelity and Casualty Co., 304 Pa. 526 ..... 13, 18, 21, 24, 28, 29
Mullins Lumber Co. v. Williamson & Brown Land & Timber Co., 255 Fed. 645 22
Purdy v. Massey, 306 Pa. 288 ..... 13, 14, 15, 18, 24, 29
Sturtevant Co. v. Fidelity and Deposit Co., 285 Fed. 367 22
Swartz v. Ainwell Co., 227 N. Y. 184 17
Union Trust Co. v. Citizens Trust Co., 185 Pa. 217 ... 16
United Real Estate Co. v. McDonald, 140 Mo. 605; 41 S. W. 913 ..... 17, 24
Warren County v. Southern Surety Co., 34 Fed. (2d) 168, 170 (E. D. of Pa.) 23
Weightman v. Union Trust Co., 208 Pa. 449 ..... 14, 16
Wheeler v. Equitable Trust Co., 206 Pa. 428 16
Wicker v. Hoppock, 73 U. S. 94 ..... 16, 18

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3 Sutherland, "Damages" (4th Ed.) § 765 14
31 Corpus Juris, page 420, § 7 17
14 R. C. L. 57 17
16 Am. & Eng. Cyc. Law (2d Ed.) 179 17
Hughes, Federal Practice, Jurisdiction and Procedure (1931), Vol. 6, § 3735, page 375 22

STATUTE CITED.

Judicial Code, § 240 (a) Amended by Act February 13, 1925 (43 Stat. 936, c. 229) 11

IN THE

Supreme Court of the United States.

No. . October Term, 1932.

THE TRAINOR COMPANY,
Petitioner,

v.

THE AETNA CASUALTY AND SURETY CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Trainor Company, respectfully shows to this Court as follows:

ORIGIN AND NATURE OF THE CASE.

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review its decision affirming the action of the United States District Court for the Eastern District of Pennsylvania in restricting the plaintiff's judgment to nominal damages. The decision of the Circuit Court of Appeals was filed December 21, 1932, and appears at page 63 of the record. It has not yet been officially reported. The opinion of the District Court is found on page 31 of the record, and is officially reported in 49 F. (2d) 769.

This is an action of assumpsit brought by the plaintiff as obligee against the defendant upon a bond guaranteeing the completion of a building operation. Suit was originally brought in the Court of Common Pleas of Philadelphia County and later, by agreement, was supplanted by this suit in the United States District Court for the Eastern District of Pennsylvania. The bond recited that the principal, Copley Homes Inc., was indebted to the plaintiff in the amount of $28,000, being the balance of the purchase price due the plaintiff for fifty-two lots of ground which the plaintiff conveyed to Copley Homes Inc.; and that it desired the plaintiff to accept in payment an equity in a second mortgage secured on the premises and on the houses to be erected thereon. To induce the plaintiff to accept this security as payment, the obligors represented and warranted that each of these fifty-two lots would be improved with a building and other improvements in accordance with the plans and specifications. The condition of the bond was that if within ten months from its date, October 13, 1927, each of the fifty-two lots should be fully improved and completed with a building together with other improvements in accordance with the plans and specifications, then the bond should be void, otherwise it should remain in full force and effect in law.

The case was tried before Judge William H. Kirkpatrick without a jury. In addition to the facts recited, Judge Kirkpatrick found them to be in brief as follows: Copley Homes Inc. immediately began building fifty-two houses on the lots. On August 13, 1928, the date for completion fixed by the bond, twenty-four houses had been fully completed. The remaining twenty-eight houses had not been completed either fully or substantially. The operation was, however, ultimately completed by the holder of

the first mortgages on December 27, 1929, as a result of a settlement with the defendant. Immediately thereafter the holder of the first mortgage foreclosed, buying in all the properties for the sum of $50.00 and thus wiping out the equity of The Trainor Company in the second mortgage. The plaintiff has received in all $13,026.02 from Copley Homes Inc. on account of its obligation to pay $28,000 with interest.

The Court further found that on August 13, 1928, the date fixed for completion by the defendant's bond, the value of the twenty-eight uncompleted houses was $6700 each. This amount was, very slightly, in excess of the amount of the plaintiff's mortgage on each house and all prior liens. On that date the completed houses were worth $7950 each. Subsequent to August 13, 1928, the total sum of $26,071 was spent in completing the operation. During 1928, 1929 and 1930 the value of real estate generally and in the locality in which this operation was, declined steadily. It is not disputed that at the time of the breach of the bond The Trainor Company could not under the terms of the mortgage protect itself by foreclosure.

On the basis of those facts the learned Trial Judge reached the following conclusions of law relevant to the issues:

He held that the bond was a bond of guaranty and not of indemnity and that there having been a breach, the plaintiff was entitled to judgment. He further held, however, that there is no substantial difference in the measure of damages upon the breach of a bond of guaranty and the breach of a bond of indemnity and that on a guaranty bond the plaintiff must show loss or else be limited to nominal damages, and that, since the value of the property in the condition in which it was left was equal to the sum of the

plaintiff's mortgage debt as well as prior liens, the plaintiff's mortgage was protected and it was entitled to nominal damages only.

In reaching these conclusions, as will be apparent by perusal of the opinion of the learned Trial Judge (49 F. (2d) 769), the learned Trial Judge believed that he was following the law as laid down by the Supreme Court of Pennsylvania and did not attempt or purport to lay down a different rule for the Federal Courts opposed to the State law.

An appeal was taken by the plaintiff to the Circuit Court of Appeals for the Third Circuit. After the appeal was taken but before it was argued, two cases were decided by the Supreme Court of Pennsylvania squarely covering the question of the measure of damages on the breach of a bond given to a mortgagee-obligee guaranteeing the completion of a building. In both opinions the Supreme Court squarely held that the conclusion reached by the learned Trial Judge in the instant case as to the measure of damages was not the law of Pennsylvania.

In MECHANICS TRUST CO. v. FIDELITY AND CASUALTY Co., 304 Pa. 526, 535, Mr. Chief Justice Frazer held "The measure of damages on a bond given to a mortgagee-obligee guaranteeing completion, is the cost of completion . . . *and is not limited to the difference between the value of the property in the condition in which it was left and the amount of principal and interest due on the mortgage.*"

In PURDY v. MASSEY, 306 Pa. 288, a case which presented strong equities on behalf of the defendant, both the lower court and the Supreme Court had the opinion of the learned Trial Judge in the instant case strongly urged

upon them and specifically refused to follow it, declaring the proper measure of damages to be that laid down by Mr. Chief Justice Frazer in Mechanics Trust Co. v. Fidelity and Casualty Co., *supra*.

Both of these cases, as well as cases to the same effect from other jurisdictions, were urged by the Appellant upon the Circuit Court of Appeals. The Circuit Court of Appeals, however, in its opinion affirmed, in effect, upon the opinion of the court below. In its opinion the Court did not refer to the opinion of Mr. Chief Justice Frazer in Mechanics Trust Co. v. Fidelity and Casualty Co., *supra*, but concluded

> "We do not regard the decision in Purdy v. Massey as creating a new local law of Pennsylvania but that, at most, it declared the common law of that state (as those terms are used in the two decisions last cited) with respect not to property but to the subject of suretyship, which from its very nature is general law running, like commercial law, broadly through all the states. In such case 'where the common law of the state is derived from the principles of general jurisprudence common to all the states' a federal court may (as we have done) exercise an independent judgment as to what is the law without respect to the decision of the state court as binding authority.
>
> "We are of opinion the Court below committed no error in holding that when on August 13, 1928, Trainor's mortgage was protected and, therefore, it committed no error in restricting the judgment to nominal damages."

THE QUESTIONS INVOLVED.

1. Was the court below correct in holding that there is no substantial difference in the measure of damages for the breach of a bond giving an absolute guaranty of completion and an indemnity bond?

2. Was the lower court correct in holding that the measure of damages on a bond given to a mortgagee-obligee guaranteeing completion is the difference between the value of the property in the condition in which it was left and the amount of principal and interest due on the mortgage and prior liens?

3. Was the lower court correct in holding that the issue presented by the instant case is one of suretyship rather than a question of the measure of damages?

4. Was the lower court correct in holding that the question here involved is a matter of general law concerning which a Federal Court may exercise an independent judgment as to what is the law without respect to the decision of the State court as binding authority?

5. Where there is a definite clearly enunciated principle of commercial law laid down by the court of last resort of a state, should the Federal Courts adopt a diametrically opposite view unless compelled thereto by potent reasons of policy or legal soundness?

6. Was the Circuit Court of Appeals correct in holding that on the facts as found by the learned Trial Judge The Trainor Company's mortgage was protected and it, therefore, was entitled to nominal damages only?

REASONS FOR GRANTING THE WRIT.

1. Because the judgment of the Circuit Court of Appeals in affirming the ruling of the lower court that there is no substantial difference between the measure of damages for the breach of a bond giving an absolute guaranty of completion and an indemnity bond establishes a rule on a question of fundamental legal importance that is not only directly in conflict with the established law of Pennsylvania, but also directly contrary to the law on that point as stated by your Honorable Court. This rule is also irreconcilable with earlier decisions by the same court and with the rule as laid down by the texts. No authority is cited by either the District Court or the Circuit Court of Appeals to support this ruling nor has counsel been able to find any such authority.

2. Because the measure of damages applied by the Circuit Court of Appeals in affirming the District Court has been explicitly disavowed by the Supreme Court of Pennsylvania and is in direct conflict with the rule applied by the Court of Appeals of New York State and the question is one of fundamental importance in the construction of all bonds.

3. Because in holding that the question of law presented by the instant case is a matter of general law concerning which a Federal Court may exercise an independent judgment without respect to the decision of the State courts, the Circuit Court of Appeals is directly in conflict with the decisions of the Circuit Court of Appeals of the 2nd, 4th and 9th Districts.

4. Because the Circuit Court of Appeals in affirming the decision of the District Court has decided important

questions of general law in a manner that is untenable and is in conflict with a great weight of authority.

5. Because in holding that The Trainor Company's mortgage was protected in the instant case and that the plaintiff suffered nominal damages only, the Circuit Court of Appeals reached a conclusion in direct conflict with the decision to the Supreme Court of Pennsylvania and the Court of Appeals of New York State in closely analogous cases and one not tenable in view of the facts found by the learned Trial Judge.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said cause, to the end that the same may be reviewed and determined by this Court as provided by law, and that the said decree of the Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and appropriate; and your petitioner will ever pray.

THE TRAINOR COMPANY,

By EDWARD E. DICKER,
Secretary.

DAVID L. ULLMAN,
JOSEPH J. BROWN,
Counsel for Petitioner.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

EDWARD E. DICKER, being duly sworn according to law, deposes and says that he is secretary of The Trainor Company, petitioner herein, duly authorized to make this affidavit on behalf; that he has read and knows the contents of the foregoing petition, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

EDWARD E. DICKER.

Sworn to and subscribed before me this seventeenth day of March, A. D. 1932.

CLARENCE A. GOSLIN,
(Seal) *Notary Public.*
Commission expires February 21, 1935.

CERTIFICATE OF COUNSEL.

We hereby certify that we have examined the foregoing petition. In our opinion the petition is well founded and the case is one in which the prayer of the petitioner should be granted by this Honorable Court. It is presented in good faith and not for delay.

JOSEPH J. BROWN,
DAVID L. ULLMAN,
Counsel for Petitioner.

IN THE

Supreme Court of the United States.

No. . October Term, 1932.

THE TRAINOR COMPANY,
Petitioner,

v.

THE AETNA CASUALTY AND SURETY CO.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania (Kirkpatrick, *D. J.*), rendered on February 13, 1931, appears at R. 31 and is reported in 49 F. (2d) 769. The opinion of the Circuit Court of Appeals, rendered on December 21, 1932, appears at R. 63 and is not yet officially reported.

JURISDICTION.

The judgment (order for mandate) of the Circuit Court of Appeals was entered January 25, 1933 (R. 69). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, c. 229) and under Rule 38 of this court.

STATEMENT.

A statement of the facts and proceedings will be found in the petition.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in the following respects:

1. In failing to reverse the ruling of the District Court that there is no substantial difference between the measure of damages for the breach of a bond giving an absolute guaranty of completion and for the breach of a bond indemnifying against loss for failure to complete.

2. In holding that "since the value of the property as of August 13, 1928 (the date of the breach) was more than the sum of the plaintiff's mortgage and prior leins, the plaintiff is not entitled to any substantial damages."

3. In failing to hold that the measure of damages due a mortgagee-obligee for the breach of a bond guaranteeing completion of an operation by a certain date is the difference between the value of the completed buildings which the obligee was guaranteed and the value of the buildings in the condition in which they were left, or so much thereof as is necessary to pay the plaintiff's mortgage in full; and is not limited to the difference between the value of the property in the condition in which it was left and the amount of principal and interest due on the mortgage and all prior liens.

4. In holding that the instant case presents a question of suretyship and not a question as to the proper measure

of damages for the breach of a bond guaranteeing the completion of a building operation.

5. In holding that the question presented in the instant case is one of general law in which a Federal Court may exercise an independent judgment without respect to the decisions of the State Court.

6. In failing to hold that the law of the instant case is governed by the decisions of the Pennsylvania Supreme Court in Mechanics Trust Co. v. Fidelity and Casualty Co., 304 Pa. 526, and in Purdy v. Massey, 306 Pa. 288.

7. In holding that the plaintiff's mortgage was protected on August 13, 1928 (the date when the bond guaranteed completion) and that, therefore, the plaintiff was entitled to nominal damages only.

ARGUMENT.

POINT 1.

There has long been a well-established and clear-cut distinction between an affirmative covenant for a specific thing and one of indemnity against damage by reason of the non-performance of the thing specified: PURDY v. MASSEY, 306 Pa. 288; WEIGHTMAN v. UNION TRUST Co., 208 Pa. 449. It is in ignoring this distinction that the District Court and the Circuit Court of Appeals fell into error in the instant case.

The rule is stated in 3 Sutherland "Damages" (4th Ed.), Section 765, "Where the contract is more than for an indemnity against damages, as where a party stipulates . . . for performance of any kind, the damages are not the gist of the action and the value of performance will measure the amount recoverable for the breach. The measure of damages . . . is the amount which would have been received if there had been a faithful performance."

In PURDY v. MASSEY in the opinion of the lower court, reported 15 D. & C. 485, the Court had before it the opinion of the District Court in the instant case and held

> "We are well satisfied, as we were before, that the bond of the Indemnity Insurance Company of North America given to the plaintiff, Elizabeth Purdy, in this case is a bond of guaranty and not a mere bond of indemnity against loss. The bond is an affirmative covenant for the doing of a specific thing, that is, the erection of the garage in question in accordance with the plans and specifications, and not a bond of indemnity merely against loss or damage by reason of the non-performance of that undertaking.

> "There is some confusion in the cases of other jurisdictions about the measure of damages to which obligees in both classes of these bonds are entitled, and in a very late case, on which counsel for the defendants places great reliance, TRAINOR CO. v. AETNA CASUALTY AND SURETY CO., 49 F. (2d) 769, the court expressed the opinion that there is no substantial difference in the measure of damages in these classes of bonds, holding that on a guaranty bond the obligee must show loss or else be limited to nominal damages, while on an indemnity bond, if he fails to show loss, he is out of court altogether. We do not understand that to be the law in Pennsylvania, so far as a guaranty bond is concerned. It has been stated quite to the contrary."

This opinion was affirmed by the Supreme Court in 306 Pa. 288. The Supreme Court had before it precisely the same arguments that were presented to the Circuit Court of Appeals in the instant case. An examination of the briefs filed on behalf of the Aetna Casualty and Surety Company in the present case and on the Indemnity Insurance Company of North America, Appellee, in PURDY v. MASSEY, will show that the two briefs are practically verbatim the same from cover to cover. The Supreme Court of Pennsylvania having that argument before it in an opinion by Mr. Justice Drew held

> "*The basic question in this case is whether or not the bond in suit is one of guaranty or indemnity.* The action is assumpsit on a completion bond; the lower court held it to be a guaranty, and the measure of damage thereon to be the cost of completion. . . . In the instant case the bond guaranteed the completion of the building; if there had not been a breach of the obligation of the bond, the building would have been erected. Since this was not done, the plaintiff can only be put in as good a position as if the contract had been carried

> out by giving her the cost of construction, not exceeding, of course, the amount of the bond. The measure of damage on a bond guaranteeing completion is the cost of completion: EQUITABLE TRUST CO. v. NATIONAL SURETY CO., 214 Pa. 159; MECHANICS TRUST CO. v. FIDELITY & CASUALTY CO., 304 Pa. 526; BOARD OF EDUCATION v. MARYLAND CASUALTY CO., 27 Fed. (2d) 20."

To the same effect are WHEELER v. EQUITABLE TRUST CO., 206 Pa. 428; EQUITABLE TRUST CO. v. NATIONAL SURETY CO., 214 Pa. 159; WEIGHTMAN v. UNION TRUST CO., 208 Pa. 449; UNION TRUST CO. v. CITIZENS TRUST CO., 185 Pa. 217.

The District Court and the Circuit Court of Appeals seem to distinguish these cases on the ground that the obligee in the instant case is a mortgagee and not an owner, but in every one of the cases cited above the obligee was the mortgagee, and it is, therefore, submitted that it is the nature of the bond and not the status of the obligee which determines the liability.

The distinction between an obligation to do a specific thing and an obligation to indemnify against loss for failure to perform has long been recognized in the Federal Courts: WICKER v. HOPPOCK, 73 U. S. 94. There the distinction between the two bonds is carefully considered and the measure of damages for the breach of a contract to pay or perform as distinguished from a contract to indemnify is stated to be the amount which would have been received if the contract had been kept and not broken. To the same effect is CUDABACK v. HAY, 134 Fed. 120, in an opinion by the U. S. District Court for the Eastern District of Pennsylvania which was affirmed by the Circuit Court of Appeals for the Third Circuit in 139 Fed. 369.

The same rule is laid down by the New York Court of Appeals in BELLONI v. FREEBORN, 63 N. Y. 383, and KIDD v.

McCormick; 83 N. Y. 391; and in United Real Estate Co. v. McDonald, 140 Mo. 605; 41 S. W. 913. The textbook writers unanimously support the same rule.

31 Corpus Juris, page 420, Section 7;

14 R. C. L. 57;

16 Am. & Eng. Cyc. Law (2d Ed.) 179.

The only case cited by either the District Court or the Circuit Court of Appeals to support the rather revolutionary view set forth by the District Court is Swartz v. Ainwell Co., 227 N. Y. 184. In regard to this case, it is to be observed that in the first place this was a four to three decision with Justices Cardozo and Pound among the dissenting Judges. In the second place Swartz v. Ainwell is not authority for the rule which it is cited as supporting. A careful reading of the case and a perusal of the synopsis of counsel's briefs preceding the opinion in the report, will make it clear that what was there decided was not the proper measure of damages on a guaranty bond, but whether the bond there under consideration was in fact a guaranty or an indemnity bond. The majority of the Court decided that the purpose of this bond was to indemnify and that therefore, actual loss must be shown. It is respectfully submitted that the proper measure of damages for the breach of a bond guaranteeing performance is the amount which would have been received if there had been a faithful performance and that the Circuit Court of Appeals erred in refusing to so hold.

Point 2.

The law governing the proper measure of damages for the breach of a bond given to a mortgagee-obligee guaranteeing completion is so fully covered by the recent Pennsyl-

vania opinions in MECHANICS TRUST CO. v. FIDELITY & CASUALTY Co., 304 Pa. 526, and in PURDY v. MASSEY, 15 D. & C. 485 and 306 Pa. 288, and the facts in those cases are so closely analogous to the facts in the present case that to refer to them adequately would require quotation practically in full.

The contention of the defendants in each of these cases was precisely the same as the contention of the defendant in the instant case and it is worthy of note that in MECHANICS TRUST Co., *supra*, Mr. Chief Justice Frazer postulated a conclusion of nominal damages under the facts in the instant case as being a reductio ad absurdum conclusively establishing the fallacy of the measure of damages contended for by the defendants in all three cases and adopted by the Circuit Court of Appeals in the instant case.

In PURDY v. MASSEY, in both the lower court and the Supreme Court, the Court had before it the opinion of the learned District Judge in the instant case and specifically refused to follow it. The lower court after considering the opinion stated, "We do not understand that to be the law in Pennsylvania, so far as a guaranty bond is concerned. It has been stated quite to the contrary," and the Supreme Court in its opinion by Mr. Justice Drew cited the instant case as an example of a plain and unambiguous covenant to do a specific thing where there could be no doubt that the bond was one of guaranty.

POINT 3.

The basic rule establishing the measure of damages for a breach of a covenant to do a specific thing is that laid down by your Honorable Court in WICKER v. HOPPOCK, 73 U. S. 94, where it was held "that on the breach of a contract to

pay or perform as distinguished from a contract to indemnify, that which would have been received if the contract had been kept is the measure of damages if the contract is broken." Applied to the facts in the instant case, the Pennsylvania Supreme Court has declared the measure of damages to be the cost of completion. As is pointed out in a very able opinion by the Court of Appeals of New York in KIDD v. MCCORMICK, 83 N. Y. 391. "Stated in its broadest form, the plaintiff is to have that compensation which will leave him as well off as he would have been if the contract had been fully performed. With more particularity he has a right to a house as good as that which the defendants agreed to furnish; and his damage is the difference between the value of the house furnished and the house as it ought to have been furnished." As the New York Court of Appeals points out, that difference in value may be measured by the cost of completion. In none of the cases heretofore referred to has the cost of completion—or the difference in value between the completed and the incompleted houses—been greater than the amount of the mortgage and that situation has, therefore, not been discussed. In the instant case, both the cost of completion and the difference in value are substantially greater than the unpaid balance of the plaintiff's mortgage. The plaintiff, applying to the facts of the instant case the fundamental rule that they are entitled to receive only that which they would have obtained if the contract had been kept and not broken, claim only so much of the cost of completion—or difference in value—as would suffice to pay their mortgage in full. This is not, as the District Judge seemed to think, a departure from the measure of damages contended for by the plaintiff and laid down in the cases cited but merely an application of that principle to the facts of the instant case.

POINT 4.

The Circuit Court of Appeals held in its opinion (R. 63) that the opinions of the Supreme Court of Pennsylvania declared the common law of Pennsylvania with respect not to property but with the subject of suretyship, which from its very nature is a general law, running like commercial law broadly through all the states.

It is respectfully submitted that the question here at issue is not a question of suretyship but one of the measure of damages for the breach of a bond. The bond (R. 9) is a joint and several bond of the builder and the defendant. The plaintiff has elected to sue the defendant. No question peculiar to the law of suretyship is presented. It happens that the defendant was a surety on the bond but that is purely accidental and incidental. Precisely the same issues would be presented if the suit were against the principal and the issue presented is to determine the proper measure of damages for the breach of a bond guaranteeing the completion of a building.

POINTS 5 AND 6.

It is respectfully submitted that whether the instant case is regarded as presenting a question of suretyship or of the measure of damages that the decisions of the State Court of last resort should be followed by the Federal Courts. It should be noted that the instant case deals with a bond executed in Pennsylvania and to be carried out in that State; that the giving of the bond was a condition precedent to the conveyance by the plaintiff of real estate owned by it here and was aimed to protect a mortgage on that real estate; that suit was originally instituted in the courts of Pennsylvania and that the present issue finds

itself in the Federal Courts only because of the somewhat synthetic citizenship of the defendant corporation. No federal question is involved. The law invoked is of local character. The distinction between a bond guaranteeing the performance of an act and an indemnity bond has long been well established in Pennsylvania and that distinction has previously been recognized and followed by the District Court of this district and the Circuit Court of Appeals for the Third Circuit: CUDABACK v. HAY, 134 Fed. 120, affirmed 139 Fed. 369. All these facts may be presumed to have been in the minds of the parties when the bond was executed, for, as is pointed out in MECHANICS TRUST CO. v. FIDELITY & CASUALTY CO., 34 Dauphin Co. Rep. (Pa.) 47, the premium paid to the surety company for a bond of guaranty is substantially greater than that paid for a bond of indemnity and it may, therefore, be assumed that both parties believed that the plaintiff was getting greater protection under the form of bond executed in the instant case.

In other circuits it is well determined that in the construction of surety bonds and in determining the measure of damages, the Federal Courts will follow the rule laid down by the State Courts. In COMMUNITY BUILDING v. MARYLAND CASUALTY CO., 8 Fed. (2d) 678, the Circuit Court of Appeals of the Ninth Circuit had before it a bond given by a surety company guaranteeing the completion of a dormitory by a certain date. The contractor abandoned work and the plaintiff completed the job and brought suit for the cost of completion. The District Court there held that while under the State law the plaintiff was entitled to recover, under the Federal rule it had forfeited that right by failure to promptly notify the surety company of the contractor's breach. After a very careful consideration of the authorities, the Court held

> "From the foregoing consideration we reach the conclusion that in determining the rights of litigants arising out of a contract of suretyship such as this one, made and to be performed in the State of Washington, the Federal Court should follow the rule established by the highest court of that state."

It, therefore, reversed the judgment and remanded the case to the court below with instructions to enter judgment in favor of the plaintiff in the amount to which it was entitled.

In STURTEVANT COMPANY v. FIDELITY AND DEPOSIT COMPANY, 285 Fed. 367, the Circuit Court of Appeals of the Second District held that in construing a bond given by a school contractor it should follow the State rule.

In MULLINS LUMBER CO. v. WILLIAMSON & BROWN LAND & TIMBER CO., 255 Fed. 645, the Circuit Court of Appeals for the Fourth Circuit held that the measure of damages for the taking of timber was determined by the State law, and in HUGHES FEDERAL PRACTICE, JURISDICTION AND PROCEDURE (1931), Volume 6, Section 3735, Page 375, the rule is laid down "The Federal Courts follow the law of the State in which they are sitting, as declared by the State Courts, in respect to damages in actions at law." In note 41, a number of cases are cited supporting this statement. Among them is a decision of the District Court for the Eastern District of Pennsylvania in AMERICAN ICE COMPANY v. POCONO SPRINGS ICE COMPANY, 179 Fed. 869, affirmed by the Circuit Court of Appeals for the Third Circuit in 183 Fed. 193.

The general principles upon which the plaintiff's position rests could not be better stated than has been done by

the learned Judges of the Circuit Court of Appeals for the Third Circuit in McLain v. Provident Saving Life Assurance Society of New York, 110 Fed. 80, 91.

> "In extending the judicial power of the United States to controversies between citizens of different states the only purpose indicated by the constitution was to provide another forum than that of the state, not another law than that of the state. In this case the court below was exercising its jurisdiction concurrent with that of the court of the state of Pennsylvania. It was administering the laws of that state and was as much bound by its statutes and common law and its declared public policy as would the state courts in a like case."

As is further pointed out by Judge Dickinson in Warren County v. Southern Surety Co., 34 Fed. (2d) 168, 170 (Eastern District of Pennsylvania)

> "One practical obstacle to the following of different rulings in the State and United States Courts, and diversity of citizenship cases, is that the law varies with accident of residence and the sum in controversy. This should not be. The law should be uniform in its operation irrespective of the parties or financial interest at stake."

The present case is not a case where the Federal Courts have before them a series of decisions laying down a Federal rule as opposed to a State rule in the premises and feel bound by the principle of stare decisis. The only analagous case in this jurisdiction is Board of Education v. Maryland Casualty Co., 27 F. (2d) 20 (C. C. A. 3d), where the Court held that the measure of damages for the breach of a bond guaranteeing completion was the cost of construction.

This opinion was cited by Mr. Chief Justice Frazer in MECHANICS TRUST CO. v. FIDELITY & CASUALTY CO., *supra,* as supporting the Pennsylvania rule. In the argument of PURDY v. MASSEY, *supra,* it was urged upon the Pennsylvania Supreme Court in precisely the same language employed by the defendant in this case that this opinion should be distinguished because there the obligee was an owner and not the mortgagee and yet Mr. Justice Drew in PURDY v. MASSEY again cited BOARD OF EDUCATION v. MARYLAND CASUALTY CO. as being in accord with the Pennsylvania rule. It should be further noted that in his opinion in the BOARD OF EDUCATION case, Judge Woolley makes no distinction between a mortgagee-obligee and an owner-obligee but on the contrary, cites and relies upon UNITED REAL ESTATE CO. v. MCDONALD, 140 Mo. 605, which is a mortgagee-obligee case on all fours with the facts in the instant case.

It is, therefore, respectfully submitted that in holding that the Federal Courts were under no obligation to follow the State Courts on the facts presented by the instant case, that the Circuit Court of Appeals for the Third Circuit fell into error and that this error should be corrected before it becomes imbedded in the law. The practical result of having conflicting rules in the State and Federal Courts governing bonds guaranteeing the completion of building operations cannot but be detrimental to the entire building industry and confusing to a degree. The revival of building operations is essential to the country's prosperity. A safe and secure method of financing such operations is in turn essential to the revival of building activities. It is an anomaly to have a bond couched in the same language construed in one way in the State Courts and in a diametrically

opposite way in the Federal Courts. Whether a person can recover upon the breach of such a bond will then depend upon whether the defendant company happens to be a Pennsylvania corporation or a foreign corporation doing business in Pennsylvania, or upon whether the amount of damages incurred is more or less than $3000. Unless the owners of property feel that they are getting real protection and not merely nominal protection they will not be willing to subordinate purchase money mortgages to construction mortgages as was done in this case and as is a very common method of financing building operations in Pennsylvania. To make this procedure uncertain and fraught with danger for the owner of the real estate cannot but have unfortunate results.

POINT 7.

The Circuit Court of Appeals erred in holding that the plaintiff's mortgage was in fact protected on August 13, 1928, and that, therefore, the plaintiff was entitled to nominal damages only.

It is respectfully submitted that judicial decisions must correspond to the actual facts of business life and that in so far as they do not do so they stand self-indicted. To hold that the plaintiff, holding as it did a junior lien in a second mortgage secured upon a building operation more than half of which was incomplete was in fact protected, is to fly in the face of the conceded facts and in the face of the everyday experience of all men having knowledge of the matters. True, the learned Trial Judge found that the value of the incompleted buildings was equal to the sum of the plaintiff's mortgage and all prior liens; but how could the plaintiff avail itself of that fact? Its mortgage was not in default; it could not sell the properties and thus

realize on the value which the Trial Judge found they had. Even if the plaintiff found a purchaser and produced him to the owner, the owner was under no obligation to sell for a sum equal to the face of the mortgages only and renounce his investment in the buildings and all hope of profit, nor was there any way in which the plaintiff could compel the owner to sell. If the owner elected to sit by, as it did in this case, hoping to find funds to complete, hoping that the real estate market would rise, hoping somehow to make a profit, there was nothing that the plaintiff could do to protect itself. In the meantime, as found by the learned Trial Judge, real estate values were continually declining. Interest on prior liens was accumulating, taxes were piling up, insurance premiums had to be paid. The partially completed buildings were standing exposed to the action of the weather and to deterioration.

Incompleted houses cannot be rented, can produce no income with which to meet these carrying charges which are constantly accruing. It is a matter of which the Court should take judicial notice that it is difficult, if not impossible, to find a purchaser for a partially completed structure even though a completed house in the same location may be readily saleable. All these things the parties knew and it was to protect the plaintiff against precisely this situation that the bond in suit was entered into. To hold that a second mortgagee under these circumstances is adequately protected is to follow a theory and to ignore the actual situation and results in a conclusion which cannot possibly be justified by the admitted objective facts.

The plaintiff had contracted to get and the defendant had guaranteed to give it, not an incompleted house worth the sum of mortgages on the date of the breach but worth

less every day thereafter, but a completed structure capable of yielding a revenue which would meet the carrying charges and prevent a foreclosure because of a default in prior liens. The plaintiff had parted with its land upon the defendant's guarantee that it would be given as security for its mortgage completed buildings by a certain date. That was the security stipulated for. That was the contract made by the parties, and the Courts have no right to compel the plaintiff to accept in lieu of the security contracted for an entirely different and manifestly inferior protection. The actual inadequacy of the security of incompleted houses is well pointed out in the opinion of the New York Court of Appeals in KIDD v. MCCORMICK, 83 N. Y. 391, and is well illustrated by the actual course of events in the instant case.

If the contemplated houses had not been marketable the plaintiff's loss would have been incurred through its own bad business judgment and it could have no ground for complaint. But the completed houses were readily marketable for $7950, $1250 more than the sum of the mortgages and all liens. If the defendant's obligation had been kept and not broken, the plaintiff would have been paid in full. But the defendant's obligation was not kept. Instead of completed houses worth $7950, it was given as security incompleted houses worth $6700 and which could produce no revenue to meet the constantly accruing charges. The plaintiff was forced to sit by helpless while mortgage interest, unpaid taxes and insurance premiums accumulated, while the real estate market steadily dropped, until finally the operation was foreclosed upon by the holder of the first mortgage and the plaintiff's equity was entirely wiped out. How could it be said under these facts that the plaintiff has suffered nominal damages only?

The fallacy of the conclusion reached by the Circuit Court of Appeals is further pointed out in the opinion of Mr. Chief Justice Frazer in MECHANICS TRUST CO., *supra,*

> "Defendant company . . . argues that its liability should be measured by the difference between the value of the property in the condition in which it was left by Turby and the amount of principal and interest due on the mortgage. This theory proceeds upon the erroneous assumption that the bank loaned the $15,000 to Turby solely upon the bond and mortgage executed on February 7, 1928. At the time plaintiff loaned the money, it took an obligation on land upon which four completed houses *were to be built.* The mortgage was upon land and completed houses. The bank was not satisfied with the security of the bond and mortgage so long as the houses were not in existence and consequently required Turby to give it additional security of a bond guaranteeing that the houses would be built. Defendant company became surety on Turby's bond that completion of the building would take place. Plaintiff had a right to require the personal surety bond in addition to the other security, and defendant, being paid for the suretyship, was obliged to know the legal effect of its obligation at the time it became surety. Plaintiff, by this bond, protected itself against the possibility of breach by Turby; i. e., the possibility of his not enhancing the value of the premises as he had promised to do. Plaintiff was entitled to have the buildings completed, and the damage to it occasioned by the breach, in so far as concerns the surety on its bond, was the reasonable value of completion."

CONCLUSION.

It is respectfully submitted that in holding that there is no substantial difference as to the measure of damages between a bond guaranteeing the performance of an act and a bond indemnifying for non-performance that the Circuit Court of Appeals has taken a position opposed to the almost unanimous weight of authority.

The direct conflict between the rule adopted in the instant case and the rule applied by the Supreme Court of Pennsylvania cannot but result in uncertainty and confusion and be detrimental to the public interest which is directly concerned in making possible the revival of the building industry.

The conclusion of the Circuit Court of Appeals that in questions of suretyship, or more properly speaking, measure of damages in actions of law, the Federal Courts may exercise their independent judgment without respect to the decisions of the State Courts, is directly contrary to the conclusions reached by the Circuit Courts of Appeals in the Second, Fourth and Ninth Circuits and this conflict of opinion should be resolved by your Honorable Court.

The conclusion of the Circuit Court of Appeals that the plaintiff was protected because the incompleted buildings were worth the sum of the mortgages as of the date of the breach is directly contrary to the conclusion reached by the New York Court of Appeals in KIDD v. MCCORMICK, *supra*, and by the Pennsylvania Supreme Court in MECHANICS TRUST CO. v. FIDELITY & CASUALTY CO. and PURDY v. MASSEY, and furthermore cannot be sustained in view of the admitted facts.

The petition for writ of certiorari should be granted.

Respectfully submitted,

DAVID L. ULLMAN,
JOSEPH J. BROWN,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

No. [redacted]. 13 October Term, 1932.

THE TRAINOR COMPANY,

Petitioner,

v.

THE AETNA CASUALTY AND SURETY COMPANY,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

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SUBJECT INDEX.

	Page
Brief in Opposition to Petition for Writ of Certiorari	1
I. Jurisdiction	1
II. The Questions of Law Involved	2
III. Argument	3
Point A: There is no substantial difference between the measure of damages recoverable by a mortgagee-obligee for the breach of a bond giving an absolute guarantee of completion and for the breach of a bond indemnifying against loss for failure to complete	3
Point B: The measure of damages due to a mortgagee-obligee for the breach of a bond guaranteeing completion of a building operation is limited to the difference between the value of the property in the condition in which it existed at default and the amount of principal and interest due on the mortgage and all prior liens	7
Point C: Irrespective of whether the question at issue in the instant case be considered to be a matter of suretyship or a matter of damages which may be recovered for the breach of a completion bond, it is still a matter of general law concerning which the Federal Courts may exercise their independent judgment	10
Conclusion	15

TABLE OF CASES CITED.

	Page
Belloni v. Freeborn, 63 N. Y. 383	6
Board of Education v. Maryland Casualty Co., 27 Fed. (2d) 20 (C. C. A. 3d)	9
Bu-Vi-Bar Petroleum Corporation v. Krow, 40 Fed. (2d) 488 (C. C. A. 10th)	11
Clark v. Belt, 223 Fed. 573 (C. C. A. 8th)	11
Community Bldg. Co. v. Maryland Casualty Co., 8 Fed. (2d) 678 (C. C. A. 9th)	12
Equitable Trust Co. v. National Surety Co., 214 Pa. 159, 63 Atl. 699	9
German-American Title & Trust Co. v. Citizens' Trust & Surety Co., 190 Pa. 247, 42 Atl. 682	8
Hay v. Cudaback, 139 Fed. 369 (C. C. A. 3d)	5
Kansas City Hydraulic Press Brick Co. v. National Surety Co., 149 Fed. 507 (C. C. Mo.)	11
Kidd v. McCormick, 83 N. Y. 391	6
Longfellow v. McGregor, 61 Minn. 494, 63 N. W. 1032	8
McClain v. Provident Saving Life Assurance Society of New York, 110 Fed. 80 (C. C. A. 3d)	13
Mechanics Trust Co. v. Fidelity & Casualty Co., 304 Pa. 526, 156 Atl. 146	8, 9
Meigs v. London Assurance Co., 126 Fed. 781 (C. C. Pa.), 134 Fed. 1021 (C. C. A. 3d)	11
Mitsubishi Shoji Kaisha, Ltd., v. Davis, 291 Fed. 882 (D. C. N. Y.)	11
Mullins Lumber Co. v. Williamson & Brown Land and Lumber Co., 255 Fed. 645 (C. C. A. 4th)	12
Norway Plains Savings Bank v. Moors, 134 Mass. 129	8
Odegard v. General Casualty & Surety Co., 44 Fed. (2d) 31 (C. C. A. 8th)	11
Province Securities Corporation v. Maryland Casualty Co., 269 Mass. 75, 168 N. E. 252	5, 7
Purdy v. Massey, 306 Pa. 288, 297, 159 Atl. 545, 548	3, 5, 8, 9
Schwartz & Co. v. Aimwell Co., 227 N. Y. 184, 124 N. E. 892	6
Sturtevant Company v. Fidelity and Deposit Company, 285 Fed. 367 (C. C. A. 2d)	12
Swift v. Tyson, 41 U. S. 1	10
Union Indemnity Co. v. Vettor, 40 Fed. (2d) 606 (C. C. A. 5th)	4
Warren County v. Southern Surety Co., 34 Fed. (2d) 168 (D. C. Pa.)	13
Washburn & Moen Mfg. Co. v. Reliance Ins. Co., 179 U. S. 1	11
Weightman v. Union Trust Co., 208 Pa. 449, 57 Atl. 879	5
Wicker v. Hoppock, 73 U. S. 94	5, 10

TEXT BOOK CITED.

	Page
6 Hughes on Federal Practice, Jurisdiction and Procedure (1931), 275, Section 3735	11

IN THE

Supreme Court of the United States.

No. 797. October Term, 1932.

THE TRAINOR COMPANY,

Petitioner,

v.

THE AETNA CASUALTY AND SURETY COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. JURISDICTION.

"A review on Writ of Certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and immediate reasons therefor." (Rule 38 (5) of this Court.)

It is respectfully submitted that, for the reasons hereinafter set forth by the respondent in its argument, the facts as set forth by The Trainor Company in its Petition for Writ of Certiorari do not present any special or important reason for this Court to exercise its discretion and to grant the Writ of Certiorari sought by the petitioner herein.

II. THE QUESTIONS OF LAW INVOLVED.

The Petition in this case raises only the following questions of law:

1. Did the District Court and the Circuit Court of Appeals err in holding that there is no substantial difference between the measure of damages recoverable by a mortgagee-obligee for the breach of a bond giving an absolute guarantee of completion and for the breach of a bond indemnifying against loss for failure to complete?

2. Did the District Court and the Circuit Court of Appeals err in holding that the measure of damages due to a mortgagee-obligee for the breach of a bond guaranteeing completion of a building operation is limited to the difference between the value of the property in the condition in which it existed at default and the amount of principal and interest due on the mortgage and all prior liens?

3. Did the District Court and the Circuit Court of Appeals err in holding that the measure of damages to be applied in the instant case was a matter of general law concerning which the Federal Courts may exercise their independent judgment?

III. ARGUMENT.

Point A.

There Is No Substantial Difference Between the Measure of Damages Recoverable by a Mortgagee-Obligee for the Breach of a Bond Giving an Absolute Guarantee of Completion and for the Breach of a Bond Indemnifying Against Loss for Failure to Complete.

It is true that indemnity and guaranty completion bonds in favor of a mortgagee-obligee differ in this respect: namely, in the former, the compensation is measured by an anticipated loss; while in the latter by an actual loss. Or, in other words, in the former, the right of action does not accrue until the plaintiff has sustained a monetary loss; while in the latter, the right of action accrues immediately upon the breach. However, once the right of action has accrued, the mortgagee-obligee, irrespective of the type of the bond, is entitled to recover the same amount of damages as compensation for the loss which it has sustained. *Purdy v. Massey,* 306 Pa. 288, 297, 159 Atl. 545, 548 (1932) (dissenting opinion).

The basis for a different measure of damages in the various cases where the contractor has failed to complete his building operation does not lie in the nature of the completion bond but rather in the status of the obligee with respect to the building operation.

Where the owner is the obligee, his bargain contemplates the payment by him of a certain amount of money for a completed building and the contractor agrees to put the building on the premises for the specified price. It is

the performance of that contract which is guaranteed by the surety company. If the contractor defaults, the situation is analogous to any other case in which a plaintiff seeks to recover as damages "the benefit of his bargain" which is the difference between the contract price and the reasonable and market cost of completion. In contemplation of law the owner has suffered a legal damage when he has been deprived of the benefit of his bargain to have a building erected at a certain price and, if it will cost the owner more to have the building erected, he is entitled to recover that excess whether or not he ever actually constructs the building. *Union Indemnity Co. v. Vettor,* 40 Fed. (2d) 606 (C. C. A. 5th 1930).

Such a situation differs vastly in fact and in legal significance from the case in which the obligee under a completion bond is a mortgagee and not an owner. In such case the obligee-mortgagee is equally entitled as against the surety company to the benefit of his bargain; but the determination of exactly what constitutes the bargain involves a totally different problem as to the measure of damages. Where a surety company guarantees to a mortgagee a completed building, the mortgagee-obligee has no interest in the premises or the building to be erected, other than as security for the mortgage obligation. The bargain contemplates that the premises shall be enhanced by the erection of the proposed building. That is the only interest which the mortgagee has in the building.

If, therefore, the contractor defaults and the building is not fully erected, the legal interest of the mortgagee which is adversely affected and which the law will be compelled to protect, and as to which compensation may be claimed, *is the loss to the mortgagee of his security by reason of the contractor's default.* Thus the mortgagee

obligee is entitled to recover as damages the amount by which the security has been depleted by the failure of the contractor to perform, or so much of the difference between the value of the completed and uncompleted operation as would be necessary, together with the value of the property in the condition in which it is left by the contractor, to pay the mortgage debt and the interest thereon. *Province Securities Corp. v. Maryland Casualty Company,* 269 Mass. 75, 168 N. E. 252 (1929).

While the general language in the case of *Purdy v. Massey, supra,* may lend support to the petitioner's proposition, it is submitted (as is hereinafter more fully set forth) that the authorities cited therein do not sustain the broad and sweeping language used by the Court and that the case should be restricted to its own peculiar facts. With regard to the case of *Weightman v. Union Trust Co.,* 208 Pa. 449, 57 Atl. 879 (1904) (also cited by the petitioner), it should be noted that the question then before the Court was whether the mortgagee-obligee had set forth a complete cause of action against the defendant. In no place in said opinion did the Court discuss the measure of damages under which the plaintiff might recover compensation.

The cases of *Wicker v. Hoppock,* 73 U. S. 94 (1867) and *Hay v. Cudaback,* 139 Fed. 369 (C. C. A. 3d, 1905), are not in point although cited by the petitioner as authority of Your Honorable Court and of the Circuit Court of Appeals for the Third Circuit supporting the petitioner's contention. In the former case the defendant had agreed to bid in certain goods of X at a judicial sale at an agreed price if the plaintiff would proceed against X, obtain judgment, and levy on the said goods. The plaintiff fulfilled his part of the agreement but the defendant failed to bid at

the sale. The plaintiff therein was allowed to recover the amount which defendant had agreed to bid. In the latter case the plaintiff, as assignee, recovered from the defendants the amount which the defendants had agreed to pay to the plaintiff's assignor in the event that land which the plaintiff's assignor held as trustee for the defendant was sold on foreclosure and a deficiency judgment was entered against the said assignor. The land in question was sold on foreclosure and deficiency judgment entered against the assignor.

Nor are *Belloni v. Freeborn,* 63 N. Y. 383 (1875) and *Kidd v. McCormick,* 83 N. Y. 391 (1881), authority for the petitioner's contention. The former case involved the defendant surety's guarantee of the payment by its principal of rent for which the plaintiff and defendant's principal were both liable but had nothing to do with a building operation or completion bond. The latter case dealt with the amount which the plaintiff, as a purchase money mortgagee, could recover from a fund deposited as collateral security for the defendant's promise to build certain houses on the said premises. The plaintiff, having foreclosed on default of defendant, completed the operation and recovered from the fund of $3000 his expenditures, and the difference between the value of the houses at default and the value if the same had been completed.

On the other hand in the later case of *Schwartz & Co. v. Aimwell Co.,* 227 N. Y. 184, 124 N. E. 892 (1919), the same Court refused recovery to the plaintiff, which was suing for breach of a guarantee bond, because it had failed to allege that its assignor had or would sustain any loss, the Court nowhere in its opinion discussing the difference be-

tween indemnity and guarantee completion bonds or what effect this difference may have on the measure of damages.

The respondent, therefore, respectfully submits that the measure of damages to be applied in a suit for breach of a completion bond is not dependent on whether the bond is one of indemnity or of guarantee, but rather upon the status of the obligee with respect to the building operation to be completed.

Point B.

The Measure of Damages Due to a Mortgagee-Obligee for the Breach of a Bond Guaranteeing Completion of a Building Operation Is Limited to the Difference Between the Value of the Property in the Condition in Which it Existed at Default and the Amount of Principal and Interest Due on the Mortgage and All Prior Liens.

The measure of damages as above set forth has been adopted in suits by mortgagee-obligees for breach of completion bonds not only by the local District Court (R. 31) and by the Circuit Court of Appeals for the Third Circuit (R. 63), but also by decisions of various State Supreme Courts.

In *Province Securities Corporation v. Maryland Casualty Company,* 269 Mass. 75, 168 N. E. 252 (1929), the defendant bonding company had given a bond to a mortgagee conditioned upon the erection of certain buildings. These buildings were partly erected when the mortgage was foreclosed. The mortgagee bid in the property at considerably less than the amount of its lien and then sued the bonding company. The Court held with regard to the measure of damages that since a mortgagee holds the property for

security only, it could not recover more than the difference between the value of the property at the time of default and the amount due on its mortgage. See also *Norway Plains Savings Bank v. Moors*, 134 Mass. 129 (1883).

The same measure of damages was applied by the Supreme Court of Minnesota in the case of *Longfellow v. McGregor*, 61 Minn. 494, 63 N. W. 1032 (1895), where the mortgagee-obligee sued the surety for breach of bond conditioned on the principal's building a house by a certain date.

In *German American Title & Trust Company v. Citizens' Trust & Surety Company*, 190 Pa. 247, 42 Atl. 682 (1899), the Supreme Court of Pennsylvania adopted a similar rule of damages in the case where the owner of ground rents instituted suit for the breach of a completion bond. The plaintiff was there limited in recovery to the actual loss in the value of the ground rents.

In a dissenting opinion in the case of *Purdy v. Massey*, 306 Pa. 288, 297, 159 Atl. 545, 548 (1932), Mr. Justice Kephart presents a well-reasoned dissertation on this very question, wherein he approves and adopts the principle of law set forth in the aforementioned decisions and also adopted in this proceeding by the local District Court and unanimously affirmed on appeal by the Circuit Court of Appeals.

The petitioner, however, contends that the case of *Mechanics Trust Co. v. Fidelity & Casualty Co.*, 304 Pa. 526, 156 Atl. 146 (1931), and the majority opinion in the case of *Purdy v. Massey, supra*, present the measure of damages applicable to the present suit. The respondent, on the other hand, submits that the former case is distinguishable from the case at bar in that the plaintiff trust company

foreclosed its mortgage, bought the premises at the sale through its straw man, thereafter actually completed the said operation as the owner might have done and later sold the same at a profit. Naturally, the Court in determining the damages due to the plaintiff therein treated it as an owner and allowed it to recover the full sum of moneys *expended* by it in completing the operation. In the case at bar, the petitioner has not spent one penny for the construction of the buildings and was rightly treated as a mortgagee-obligee as distinguished from an owner-obligee. As a matter of fact the $28,000.00 obligation of the Copley Homes, Inc., to The Trainor Company was all profit to the latter company, accruing to it without any capital investment on its part (R. 31), and on which obligation The Trainor Company has received $13,026.02 (R. 35).

The case of *Purdy v. Massey, supra* (decided but with a dissenting opinion) is not so distinguishable from the case at bar but, being contrary to the prevailing decisions in states other than Pennsylvania, should be restricted to its own peculiar facts for the reason that the three authorities cited on page 295 as reported in 306 Pa. do not sustain the conclusions with respect to the measure of damages for which they are cited. *Mechanics Trust Co. v. Fidelity & Casualty Co., supra,* has already been discussed and distinguished. The case of *Equitable Trust Co. v. National Surety Co.,* 214 Pa. 159, 63 Atl. 699 (1906) has been carefully considered and distinguished by Judge Kirkpatrick in his opinion (R. 38), while in the case of *Board of Education v. Maryland Casualty Company,* 27 Fed. (2d) 20 (C. C. A. 3rd 1928) the plaintiff was the owner of the property, not the mortgagee, and, as owner, actually sustained damages in completing the operation.

The respondent further submits that the measure of damages applied in the case at bar by the Trial Judge and unanimously affirmed by the Circuit Court of Appeals is not opposed to the law as stated by Your Honorable Court. On the contrary, counsel for respondent has been unable to discover any decision of Your Honorable Court bearing on the question raised herein by the petitioner. The case of *Wicker v. Hoppock*, 73 U. S. 94 (1867), in which is set forth the general distinction between an obligation to do a certain thing and an obligation to indemnify against loss, is not authority for petitioner's contention. The facts hereinbefore set forth make its inapplicability self-evident.

The respondent further submits that there is no conflict of authority among the Circuit Courts of Appeals for the various Circuits and that there is no such conflict of authority among the Supreme Courts of the various states with regard to the measure of damages applied in the present proceeding as to justify Your Honorable Court's further consideration of this matter and that, therefore, the petition of The Trainor Company for a Writ of Certiorari should be denied.

Point C.

Irrespective of Whether the Question at Issue in the Instant Case Be Considered to Be a Matter of Suretyship or a Matter of Damages Which May Be Recovered for the Breach of a Completion Bond, It Is Still a Matter of General Law Concerning Which the Federal Courts May Exercise Their Independent Judgment.

Swift v. Tyson, 41 U. S. 1 (1842) states that the Federal Courts, regardless of state decisions, will exercise their independent judgment upon questions dependent upon principles of general jurisprudence or relating to general or commercial law.

Questions relating to the law of insurance in general and particularly to its subdivision, suretyship, are considered to fall within the above classification. *Odegard v. General Casualty & Surety Co.*, 44 Fed. (2d) 31 (C. C. A. 8th 1930) (suretyship); *Washburn & Moen Mfg. Co. v. Reliance Ins. Co.*, 179 U. S. 1 (1900) (marine insurance); *Meigs v London Assurance Co.*, 126 Fed. 781 (C. C. Pa. 1904), affirmed 134 Fed. 1021 (C. C. A. 3d, 1905) (fire insurance). In the case of *Meigs v. London Assurance Co., supra,* the District Court not only referred to the aforesaid rule but denied recovery to the plaintiff of that amount which he would have been allowed under the decisions of the Supreme Court of Pennsylvania.

A surety bond or a completion bond is merely another form of insurance which, although it differs from a marine insurance policy or a fire policy as to form and matter insured, is basically the same. Therefore, the law applicable to one type of policy should also govern the other. This natural and rational conclusion was reached in *Kansas City Hydraulic Press Brick Co. v. National Surety Co.*, 149 Fed. 507 (C. C. Mo. 1906).

Likewise, irrespective of the question of suretyship involved in this case, the measure of damages to be applied is a matter of general jurisprudence and not of local law. *Clark v. Belt*, 223 Fed. 573 (C. C. A. 8th 1915); *Bu-Vi-Bar Petroleum Corporation v. Krow*, 40 Fed. (2d) 488 (C. C. A. 10th 1930) and *Mitsubishi Shoji Kaisha, Ltd. v. Davis*, 291 Fed. 882 (D. C. N. Y. 1922).

It is quite true as stated in 6 HUGHES ON FEDERAL PRACTICE, JURISDICTION AND PROCEDURE (1931), page 275, Section 3735, that the Federal Courts will, if possible, follow the state courts with respect to damages in actions at law, just

as they will in other matters of general jurisprudence, but they nevertheless retain the right to form an independent judgment as to what is sound jurisprudence and, when their conclusion is different from that of the local state courts, will apply the common law in accordance with their independent judgment.

Nor is there any conflict of opinion in the various Circuit Courts of Appeals on this question, although such a conflict is stated by the petitioner as one of its reasons (No. 3) for the granting of a Writ of Certiorari. In *Community Bldg. Co. v. Maryland Casualty Co.*, 8 Fed. (2d) 678 (C. C. A. 9th 1925) the Court specifically recognized the aforesaid rule but, in exercising its independent judgment, preferred to follow the local state court, stating in said opinion that in addition to favoring the liberal or local state rule with regard to the construction of a bond requiring notice of default to the surety it believed that Your Honorable Court was likewise more in favor of, although not committed to, said liberal rule.

B. F. Sturtevant Company v. Fidelity and Deposit Company, 285 Fed. 367 (C. C. A. 2nd 1922) likewise recognized that the question of damages was one concerning which it might exercise its independent judgment. There too the Court, after due consideration, preferred to follow the state rule. Furthermore in that case the bond was given to secure the construction of a municipal school building and, although not so stated in the opinion, it was probably furnished pursuant to a state statute or municipal ordinance.

In the case of *Mullins Lumber Co. v. Williamson & Brown Land and Lumber Co.*, 255 Fed. 645 (C. C. A. 4th 1918) the Court applied the state law because, as stated on

page 647 of the opinion, "in a legal sense the primary question involved in the cause was the title to the land; the damages recoverable were incidental to and dependent on the title".

McClain v. Provident Saving Life Assurance Society of New York, 110 Fed. 80 (C. C. A. 3rd 1901) concerned the construction of a state statute that had previously been interpreted by state decisions which the federal court was obliged to follow.

Reference is made by the petitioner to the case of *Warren County v. Southern Surety Co.*, 34 Fed. (2d) 168 (D. C. Pa. 1929). That case did not concern the measure of damages but whether in the absence of federal authority the Court would follow the state decisions and hold that an action was not maintainable on county highway contractors' bond by the county to the use of material men for debt owing to material men by the contractor. The contract there sued upon related to a road construction within the state and, as stated by the Court, "the policy of law which concerns itself with the case is a state policy which is restricted to state constructions. The legislation is to be found in state statutes."

No state statutes are involved in the instant case nor is the question raised as to whether or not the plaintiff can maintain its action; the sole question being what is the measure of damages for breach of a completion bond. The facts presented in this case reveal that the question of the measure of damages for breach of completion bonds has a general application wherever the same may have been executed or breached and that uniformity in this matter is of as great practical importance as it is in the case of insurance policies; and that, therefore, the Federal Courts do

and should exercise their independent judgment as to the question of what is the measure of damages for a breach of such a bond.

It is therefore submitted that there is no conflict among the various Circuit Courts of Appeals, as alleged by the petitioner, with respect to the right of the Federal Courts to exercise an independent judgment concerning the measure of damages applicable in cases such as the present proceeding, but that, on the contrary, the said Circuit Courts of Appeals have under the aforesaid authorities unanimously affirmed the exercise of this right and that, therefore, the petition of The Trainor Company for a Writ of Certiorari should be denied.

Conclusion.

It is respectfully submitted that this case is not a proper one for review by certiorari in this Court. There is no substantial difference as to the measure of damages recoverable by a mortgagee-obligee for the breach of a bond guaranteeing completion of a building operation and for the breach of a bond indemnifying said obligee against loss for failure to complete. In the event that the mortgagee sues for breach of either type of bond, the measure of damages recoverable by said mortgagee-obligee is limited to the difference between the value of the property in the condition in which it was at the time of default and the amount of principal and interest due on the mortgage and all prior liens. And furthermore, since the measure of damages is a matter of general law, the Federal Court may exercise its independent judgment and apply the aforesaid measure of damages, irrespective of any decision of the local state Supreme Court which is in apparent conflict therewith.

The Petition for Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

JOSEPH W. HENDERSON,
Counsel for Respondent.

April 12, 1933.

Supreme Court of the United

No. 13, October Term, 19

THE TRAINOR COMPANY,

vs.

THE AETNA CASUALTY AND SURETY COMPANY,

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR APPELLEE.

Counsel for Appellee.

INDEX.

	Page
Official Report of the Opinions Below	1
Statement of the Case	1
The Questions of Law Involved	8
Argument	9
I. There Is No Substantial Difference Between the Measure of Damages Recoverable by a Mortgagee-Obligee for the Breach of a Bond Giving an Absolute Guarantee of Completion and for the Breach of a Bond Indemnifying Against Loss for Failure to Complete	9
II. The Measure of Damages Due to a Mortgagee-Obligee for the Breach of a Bond Guaranteeing Completion of a Building Operation Is Limited to the Difference Between the Value of the Property in the Condition in Which It Existed at Default and the Amount of Principal and Interest Due on the Mortgage and All Prior Liens	13
III. The Trial Court and the Circuit Court of Appeals in Affirming the District Court Were Both Entitled to Exercise Their Independent Judgment Regarding the Proper Measure of Damages to Be Awarded the Petitioner	20
1. Federal Courts Exercise an Independent Judgment, Irrespective of the Decisions of the Local State Courts in Matters of General Jurisprudence and Commercial Law	20
2. The Question of Measure of Damages for Breach of a Completion Bond Whether Considered to Be a Matter of Suretyship or of Damages Is Primarily a Matter of General Jurisprudence Concerning Which the Federal Courts May Exercise Their Independent Judgment	27
(a) Questions of Suretyship Are Matters of General Jurisprudence	27

Page

(b) The Questions Relating to the Measure of Damages Are Matters of General Jurisprudence 32

(c) The Use of Completion Bonds Throughout the Nation Requires a National Uniform Law and, Therefore, Questions Pertaining Thereto Are Matters of General Jurisprudence 34

Conclusion 40

TABLE OF CASES CITED.

Aetna Insurance Co. v. Commonwealth, 106 Ky. 864, 876 24

Aetna Life Ins. Co. v. Roewe, 38 F. (2d) 393 (C. C. A. 7th 1930) 26, 29

Baltimore & Ohio Railroad Company v. Baugh, 149 U. S. 368. 371 (1892) 23, 25

Bancroft v. Hambly, 94 Fed. 975 (C. C. A. 9th 1899) ... 30

Belloni v. Freeborn, 63 N. Y. 383 12

Black and White Taxicab and Transfer Company v. Brown and Yellow Taxicab and Transfer Company, 276 U. S. 518 (1928) 23

Board of Education v. Maryland Casualty Co., 27 Fed. (2d) 20 (C. C. A. 3d) 19

Burgess v. Seligman, 107 U. S. 20 (1882) 37

Butz v. City of Muscatine, 8 Wall. 575, 582 (1869) 22

Bu-Vi-Bar Petroleum Corporation v. Krow, 40 Fed. (2d) 488 (C. C. A. 10th) 26, 33

Carpenter v. Providence Washington Ins. Co., 16 Pet. 495 (1842) 28

Clark v. Belt, 223 Fed. 573 (C. C. A. 8th) 33

Cole v. Pennsylvania Railroad Co., 43 F. (2d) 953 (C. C. A. 2d 1930) 26, 27

Community Bldg. Co. v. Maryland Casualty Co., 8 Fed. (2d) 678 (C. C. A. 9th) 26

TABLE OF CASES CITED—Continued.

Page

Concordia Insurance Co. of Milwaukee v. School District No. 98 of Payne County, Oklahoma, 282 U. S. 545 (1931) 38

Dernberger v. Baltimore & Ohio Railway Company, 243 Fed. 21, 40 (C. C. A. 4th 1917) 40

Equitable Trust Co. v. National Surety Co., 214 Pa. 159, 63 Atl. 699 19

Farmers' Bank v. Hayes, 58 F. (2d) 34 (C. C. A. 6th 1932) 26, 30

German-American Title & Trust Co. v. Citizens' Trust & Surety Co., 190 Pa. 247, 42 Atl. 682 15

Hart v. Adair, 244 Fed. 897 (C. C. A. 9th, 1917) 39

Hay v. Cudaback, 139 Fed. 369 (C. C. A. 3d) 11

Henry W. Putnam Memorial Hospital v. Allen, 34 F. (2d) 927 (C. C. A. 2d 1929) 39

Home Ins. Co. v. Currie, 54 F. (2d) 203 (C. C. A. 5th 1931) 26

Hunt v. Warnick's Heirs, 3 Hardin 61 24

John Deere Plow Co. v. Mowry, 222 Fed. 1 (C. C. A. 6th 1915) 39

Johnson v. Charles D. Norton Co., 159 Fed. 361 (C. C. A 6th 1908) 30

Kansas City Hydraulic Press Brick Co. v. National Surety Co., 149 Fed. 507 (C. C. Mo.) 27

I Kent's Commentaries (14th ed.) pp. 451, 602 24

Kidd v. McCormick, 83 N. Y. 391 12

Kibby v. New England Mutual Life Ins. Co., 59 F. (2d) 9 (C. C. A. 3d 1931) 30

Kuhn v. Fairmont Coal Co., 215 U. S. 349 (1910) 37

Lake Shore & Michigan Southern Railway Co. v. Prentice, 147 U. S. 101 (1893) 32

Lathrop v. Commercial Bank, 8 Dana 114, 121 24

Long v. Monarch Accident Ins. Co., 30 F. (2d) 929 (C. C. A. 4th 1929) 26, 29

Longfellow v. McGregor, 61 Minn. 494, 63 N. W. 1032 .. 15

Mechanics Trust Co. v. Fidelity & Casualty Co., 304 Pa. 526, 156 Atl. 146 ..... 18, 19, 35

Page

Meigs v. London Assurance Co., 126 Fed. 781 (C. C. Pa.), 134 Fed. 1021 (C. C. A. 3d) 28
Mitsubishi Shoji Kaisha, Ltd., v. Davis, 291 Fed. 882 (D. C. N. Y.) 34
Nider v. Commonwealth, 140 Ky. 684, 686..... 24
Norfolk & P. Traction Co. v. Miller, 174 Fed. 607 (C. C. A. 4th 1909) 33
Norway Plains Savings Bank v. Moors, 134 Mass. 129. 14
Odegard v. General Casualty & Surety Co., 44 Fed. (2d) 31 (C. C. A. 8th) 26, 27
Province Securities Corporation v. Maryland Casualty Co., 269 Mass. 75 168 N. E. 252 .....11, 13
Purdy v. Massey, 306 Pa. 288, 297, 159 Atl. 545, 548 .....9, 11, 15, 19, 31, 35
Ray v. Sweeney, 14 Bush, 1, 9, et seq..... 24
Schwartz & Co. v. Aimwell Co., 227 N. Y. 184, 124 N. E. 892 12
Sears v. Greater New York Development Co., 51 F. (2d) 46 (C. C. A. 1st 1931).....26, 30
Security Life Ins. Co. v. Brimmer, 36 F. (2d) 176 (C. C. A. 8th 1929); Certiorari Denied 281 U. S. 744 (1930) 29
Spinks v. Mutual Reserve Fund Life Ass'n, 137 Fed. 167 (C. C. E. D. Ky. 1905) 29
Swift v. Tyson, 41 U. S. 1 .....20, 25, 26
Trainor Co. v. Aetna Casualty & Surety Co., 62 F. (2d) 487, 489 (C. C. A. 3d 1932) 26, 32
Union Indemnity Co. v. Vettor, 40 Fed. (2d) 606 (C. C. A. 5th) 10
Washburn & Moen Mfg. Co. v. Reliance Ins. Co., 179 U. S. 1 29
Weightman v. Union Trust Co., 208 Pa. 449, 57 Atl. 879 11
Wicker v. Hoppock, 73 U. S. 94 .....11, 19
Woldson v. Larson, 164 Fed. 548 (C. C. A. 9th, 1908)... 33

IN THE

Supreme Court of the United States.

No. 13. October Term, 1933.

THE TRAINOR COMPANY,
Appellant,

v.

THE AETNA CASUALTY AND SURETY COMPANY,
Appellee.

OFFICIAL REPORT OF THE OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania (R. 31) is reported in 49 F. (2d) 769.

The opinion of the Circuit Court of Appeals (R. 63) is reported in 62 F. (2d) 487.

STATEMENT OF THE CASE.

The Appellee presents the following detailed abstract of the case:

The appellant's action was in assumpsit, to recover damages on a surety bond of the appellee guaranteeing the completion of a building operation, comprising fifty-two houses, known as Copley Homes, Inc., located at Copley Road and Walnut Street, Upper Darby Township, Delaware County, Pennsylvania.

The Sun Mortgage Company was a company engaged in financing building operations through first and second mortgage moneys (R. 31).

The appellant conveyed certain real estate to Copley Homes, Inc., to carry out the building operation and, in order to finance it, borrowed the money from the Sun Mortgage Company and its subsidiary, Realty Bond and Mortgage Company (R. 31).

Settlement was had, and the price of the land without the houses to the Trainor Company was $76,000 and to the Copley Homes, Inc., $104,000 (R. 34). Copley Homes, Inc., paid The Trainor Company the $28,000 due it by giving to The Trainor Company its note for that amount and assigning to it as collateral the equity in the second mortgage (R. 32).

The appellant was not bound to disclose to the appellee the fact that the $28,000 of purchase price owing to it by Copley Homes, Inc., represented profit made by it without capital investment and arising from merely increasing the price of land which it was in a position to acquire at a lower figure (R. 36).

The appellant has received $13,026.02 from Copley Homes, Inc., on account of its obligation to pay the said $28,000 (R. 35).

The appellee at the time of settlement wrote its bond, dated October 13, 1927, in the sum of $220,000, conditioned upon the completion of the houses, which bond was in favor of the Land Title & Trust Company and the Realty Bond and Mortgage Company and The Trainor Company, upon the basis of the Copley Homes, Inc., obtaining a loan of $238,000 from the Land Title & Trust Company, $63,000 from the Realty Bond and Mortgage Company, and that The Trainor Company accepted from Copley Homes, Inc., a note in the amount of $28,000, being the balance of the purchase price due The Trainor Company for the real estate (R. 9):

The bond provided:

> "That if within ten months of the date hereof each of the lots or premises described in each of the said 52 first mortgages shall be fully improved and completed with a building together with other improvements (such as paved streets, sidewalks, driveways, gas, water, sewerage, etc.), in keeping with and as shown by the aforesaid plans, specifications and conditions, building plots and surveys . . . . then in the event that all of the above and below mentioned conditions are fully performed, this bond shall be void; otherwise it shall remain in full force and effect in law."

It further provided that in the event that the building operation in accordance with the Plans and Specifications was not completed within ten months from October 13, 1927, then the bond would be in full force and effect. The bond set forth other rights and remedies.

The building operation progressed, but at the end of the ten-month period, namely, August 13, 1928, it was not fully completed. Approximately twenty-eight houses remained at that time in an incompleted state (R. 33). They were not very far from completion, the work actually remaining to be done consisted of the installation of plumbing accessories, spigots, shower curtains, rods; painting (which was about 75 per cent. complete), papering, and installation of gas ranges and minor details in connection with carpenter work, plastering and brick work (R. 33).

There was a first mortgage of $4500 against each of the fifty-two lots, a blanket second mortgage of $88,000 covering the entire tract, which mortgage had a release clause of $2000 per house, so that the net result of the financing was in substance that each of the lots had against it a first mort-

gage of $4500 and what amounted to a second mortgage of $2000, that there was a small equity in the first mortgage (which may be disregarded) and an equity in the second mortgage over and above the amount borrowed upon it amounting to approximately $636 per lot. The equity in the second mortgage was assigned to The Trainor Company as collateral security for its note of $28,000 (R. 32).

The building operation was ultimately completed on December 27, 1929, by the Sun Mortgage Company, holder of the first mortgage as a result of a settlement made by the Sun Mortgage Company with the Aetna Casualty and Surety Company (R. 33).

The value of the twenty-eight uncompleted houses as of August 13, 1928 was $6700 each (R. 33). This amount is in excess of the appellant's mortgage on each house and on all prior liens.

In January, 1930, the Sun Mortgage Company foreclosed the first mortgages, bought in the properties and wiped out the second blanket mortgage and the equity of The Trainor Company therein (R. 35).

The Trainor Company, although it had very drastic rights under its bond with the defendant, never took advantage of any of them or made any claim on them until suit was brought. Those rights are as follows:

> "(a) On ten days written notice to the herein Surety, any one or more of the said Obligees may replace any Contractor who may fail to diligently proceed (for any reason) to perform the work and/or supply the material covered by his or their Contract for any part of the building or improvements covered by the aforesaid Plans and Specifications and Conditions, and may in place and stead of such replaced Contractor, employ any other party or parties to do,

supply and complete the work and/or material called for under the terms of any such Contract. However, said Surety shall have the right within said ten days to arrange for the prompt supply and completion of such work and material, with a party or parties satisfactory as to competence to said Trust Company or its Successors.

"(b) On fifteen days written notice to the herein Surety, any one or more of the said Obligees may pay and discharge, or defend, any Municipal or Mechanics' Lien directed against any of the aforesaid mortgaged premises, when such lien takes precedence or is claimed to take precedence to or over any of the aforesaid First or Second Mortgages. However, within said fifteen days the said Surety may pay and discharge such liens, or may defend same to the satisfaction of said Trust Company or its Successors.

"(c) Should the said buildings and improvements be not fully completed in accordance with the aforesaid Plans and Specifications and Conditions within ten months from date hereof, any one or more of said Obligees may on fifteen days written notice to the herein Surety, arrange or contract for the completion of such unfinished work and/or material. However, said Surety may within the said fifteen days arrange for the completion of said unfinished work and material within sixty days from the date of such notice, by a party or parties satisfactory as to competence to said Trust Company or its Successors.

"In the event that any of the aforesaid buildings and improvements are not made and completed, free and clear of Municipal and Mechanics' Liens, as aforesaid, within the aforesaid ten months time for completion, and any holder of any of aforesaid three collateral notes shall thereafter cause the mortgage collateral or the equity in the mortgage collateral men-

tioned therein and still held to be offered at public sale, upon forty-five days written notice to said Obligors, mailed to the Philadelphia office or agency of the said Surety, of the place (in Philadelphia) and time, when such collateral will be publicly offered for sale, it is hereby agreed that any balance still remaining due and unpaid under the terms of such note, after applying the net proceeds arising from such sale, shall be, jointly and severally, due and payable by the said obligors unto the then holder of such note and assigns, as fully and effectively as if such holder and assigns were named Obligees in this Bond. The provisions of this paragraph shall be deemed an additional method for the establishment of any loss in the collection of the money or monies due under the terms of the said notes, respectively, due to incompletion, free and clear of liens, as aforesaid, and other rights, promises or obligations existing or arising under the terms of this Bond shall remain in force and effect, whether or not said method is employed." (R. 14, 15.)

The Trainor Company, however, failed to take advantage of any of the aforesaid remedies, but instituted suit against the Aetna Casualty and Surety Company on the aforesaid bonds and the case was tried without a jury in the United States District Court for the Eastern District of Pennsylvania before his Honor, Judge Kirkpatrick, who made the Findings of Fact hereinbefore set forth.

From the said Findings of Fact, the Judge concluded as a matter of law that, *inter alia,* the bond was a bond of guarantee and, therefore, since said bond was breached, the appellant was entitled to judgment and that the measure of damages was "so much of the difference between the value of the property as of August 13, 1928, with the houses uncompleted, and the value it would have had on that date had the houses been completed, as would have been neces-

sary to pay the plaintiff's mortgage debt as well as all prior liens," and that, since the value of the property as of August 13, 1928, was more than the sum of the Appellant's mortgage and prior liens, the Appellant was not entitled to any substantial damages. (R. 35-36.) Judge Kirkpatrick then fixed the damages for the Appellant at the nominal sum of $5.00. (R. 43.)

Judgment was thereafter entered in accordance with said Opinion (R. 47), and an appeal was taken to the Circuit Court of Appeals for the Third Circuit on the principal ground that the Learned Trial Judge erred in making the aforesaid conclusions of law and in granting leave to the Appellant to enter judgment in the nominal sum of $5.00. (R. 54-56.)

In the meantime, pending the argument of this appeal, the Supreme Court handed down Opinions in the cases of *Mechanics Trust Company v. Fidelity and Casualty Co.*, 304 Pa. 526; and *Purdy v. Massey*, 306 Pa. 288, which decisions involved the discussion of the measure of damages recoverable for the breach of a completion bond.

At argument of the instant case before the Circuit Court of Appeals, counsel for Appellant in his Brief as well as at oral argument contended that the two aforesaid decisions presented the correct measure of damages to be applied in the instant case and that, said decisions having been decided by the local State Supreme Court, the Federal Courts were bound to follow said decisions.

The Circuit Court of Appeals, however, in an Opinion handed down by Judge Buffington (R. 63) unanimously affirmed the decision of the Court below in which they approved the measure of damage adopted by the Trial Court and further stated (R. 66-67) that they did not regard the case of "Purdy v. Massey as creating a new local law of

Pennsylvania," but as being merely declaratory of "the common law of that State . . . with respect not to property but to the subject of suretyship", concerning which matters the Federal Courts may, as they then did, exercise independent judgment. The Appellant thereupon petitioned your Honorable Court for a writ of certiorari, which writ of certiorari was granted on April 24, 1933.

THE QUESTIONS OF LAW INVOLVED.

1. Is there any substantial difference between the measure of damages recoverable by a mortgagee-obligee for the breach of a bond giving an absolute guarantee of completion and for the breach of a bond indemnifying against loss for failure to complete?

(*Answered by the Courts below in the negative.*)

2. Is the measure of damages due to a mortgagee-obligee for the breach of a bond guaranteeing completion of a building operation limited to the difference between the value of the property in the condition in which it existed at default and the amount of principal and interest due on the mortgage and all prior liens?

(*Answered by the Courts below in the affirmative.*)

3. Is the measure of damages to be applied in the instant case a matter of general law concerning which the Federal Courts may exercise their independent judgment?

(*Answered by the Circuit Court of Appeals in the affirmative.*)

ARGUMENT.

I. There Is No Substantial Difference Between the Measure of Damages Recoverable by a Mortgagee-Obligee for the Breach of a Bond Giving an Absolute Guarantee of Completion and for the Breach of a Bond Indemnifying Against Loss for Failure to Complete.

It is true that indemnity and guaranty completion bonds in favor of a mortgagee-obligee differ in this respect: namely, in the former, the compensation is measured by an anticipated loss; while in the latter by an actual loss. Or, in other words, in the former, the right of action does not accrue until the plaintiff has sustained a monetary loss; while in the latter, the right of action accrues immediately upon the breach. However, once the right of action has accrued, the mortgagee-obligee, irrespective of the type of the bond, is entitled to recover the same amount of damages as compensation for the loss which it has sustained. *Purdy v. Massey,* 306 Pa. 288, 297, 159 Atl. 545, 548 (1932) (dissenting opinion).

The basis for a different measure of damages in the various cases where the contractor has failed to complete his building operation does not lie in the nature of the completion bond but rather in the status of the obligee with respect to the building operation.

Where the owner is the obligee, his bargain contemplates the payment by him of a certain amount of money for a completed building and the contractor agrees to put the building on the premises for the specified price. It is the performance of that contract which is guaranteed by the surety company. If the contractor defaults, the situa-

tion is analogous to any other case in which a plaintiff seeks to recover as damages "the benefit of his bargain" which is the difference between the contract price and the reasonable and market cost of completion. In contemplation of law the owner has suffered a legal damage when he has been deprived of the benefit of his bargain to have a building erected at a certain price and, if it will cost the owner more to have the building erected, he is entitled to recover that excess whether or not he ever actually constructs the building. *Union Indemnity Co. v. Vettor,* 40 Fed. (2d) 606 (C. C. A. 5th 1930).

Such a situation differs vastly in fact and in legal significance from the case in which the obligee under a completion bond is a mortgagee and not an owner. In such case the obligee-mortgagee is equally entitled as against the surety company to the benefit of his bargain; but the determination of exactly what constitutes the bargain involves a totally different problem as to the measure of damages. Where a surety company guarantees to a mortgagee a completed building, the mortgagee-obligee has no interest in the premises or the building to be erected, other than as security for the mortgage obligation. The bargain contemplates that the premises shall be enhanced by the erection of the proposed building. That is the only interest which the mortgagee has in the building.

If, therefore, the contractor defaults and the building is not fully erected, the legal interest of the mortgagee which is adversely affected and which the law will be compelled to protect, and as to which compensation may be claimed, *is the loss to the mortgagee of his security by reason of the contractor's default.* Thus the mortgagee-obligee is entitled to recover as damages the amount by

which the security has been depleted by the failure of the contractor to perform, or so much of the difference between the value of the completed and uncompleted operation as would be necessary, together with the value of the property in the condition in which it is left by the contractor, to pay the mortgage debt and the interest thereon. *Province Securities Corp. v. Maryland Casualty Company,* 269 Mass. 75, 168 N. E. 252 (1929).

While the general language in the case of *Purdy v. Massey, supra,* may lend support to the appellant's proposition, it is submitted (as is hereinafter more fully set forth) that the authorities cited therein do not sustain the broad and sweeping language used by the Court and that the case should be restricted to its own peculiar facts. With regard to the case of *Weightman v. Union Trust Co.,* 208 Pa. 449, 57 Atl. 879 (1904) (also cited by the appellant), it should be noted that the question then before the Court was whether the mortgagee-obligee had set forth a complete cause of action against the defendant. In no place in said opinion did the Court discuss the measure of damages under which the plaintiff might recover compensation.

The cases of *Wicker v. Hoppock,* 73 U. S. 94 (1867) and *Hay v. Cudaback,* 139 Fed. 369 (C. C. A. 3d, 1905), are not in point although cited by the appellant as authority of Your Honorable Court and of the Circuit Court of Appeals for the Third Circuit supporting the appellant's contention. In the former case the defendant had agreed to bid in certain goods of X at a judicial sale at an agreed price if the plaintiff would proceed against X, obtain judgment, and levy on the said goods. The plaintiff fulfilled his part of the agreement but the defendant failed to bid at the sale. The plaintiff therein was allowed to recover the amount which defendant had agreed to bid. In the latter

case the plaintiff, as assignee, recovered from the defendants the amount which the defendants had agreed to pay to the plaintiff's assignor in the event that land which the plaintiff's assignor held as trustee for the defendant was sold on foreclosure and a deficiency judgment was entered against the said assignor. The land in question was sold on foreclosure and deficiency judgment entered against the assignor.

Nor are *Belloni v. Freeborn,* 63 N. Y. 383 (1875) and *Kidd v. McCormick,* 83 N. Y. 391 (1881), authority for the appellant's contention. The former case involved the defendant surety's guarantee of the payment by its principal of rent for which the plaintiff and defendant's principal were both liable but had nothing to do with a building operation or completion bond. The latter case dealt with the amount which the plaintiff, as a purchase money mortgagee, could recover from a fund deposited as collateral security for the defendant's promise to build certain houses on the said premises. The plaintiff, having foreclosed on default of defendant, completed the operation and recovered from the fund of $3000 his expenditures, and the difference between the value of the houses at default and the value if the same had been completed.

On the other hand in the later case of *Schwartz & Co. v. Aimwell Co.,* 227 N. Y. 184, 124 N. E. 892 (1919), the same Court refused recovery to the plaintiff, which was suing for breach of a guarantee bond, because it had failed to allege that its assignor had or would sustain any loss, the Court nowhere in its opinion discussing the difference between indemnity and guarantee completion bonds or what effect this difference may have on the measure of damages.

The appellee, therefore, respectfully submits that the measure of damages to be applied in a suit for breach of a completion bond is not dependent on whether the bond is one of indemnity or of guarantee, but rather upon the status of the obligee with respect to the building operation to be completed.

II. The Measure of Damages Due to a Mortgagee-Obligee for the Breach of a Bond Guaranteeing Completion of a Building Operation Is Limited to the Difference Between the Value of the Property in the Condition in Which It Existed at Default and the Amount of Principal and Interest Due on the Mortgage and All Prior Liens.

The measure of damages as above set forth has been adopted in suits by mortgagee-obligees for breach of completion bonds not only by the local District Court (R. 31) and by the Circuit Court of Appeals for the Third Circuit (R. 63), but also by decisions of various State Supreme Courts.

In *Province Securities Corporation v. Maryland Casualty Company,* 269 Mass. 75, 168 N. E. 252 (1929), the defendant bonding company had given a bond to a mortgagee conditioned upon the erection of certain buildings. These buildings were partly erected when the mortgage was foreclosed. The mortgagee bid in the property at considerably less than the amount of its lien and then sued the bonding company. The Court held with regard to the measure of damages that since a mortgagee holds the property for security only, it could not recover more than the difference between the value of the property at the time of default and the amount due on its mortgage.

The court first stated the rule applicable to suits brought by the owner of the property, and, after reciting this rule, said (p. 257):

> "The rule as to damages in case of a breach of an agreement to erect a building where the agreement is with the mortgagee, and not with the owner, is the same except that, as the mortgagee holds the property for security only, he cannot recover more than the difference between the value of the property in the condition in which it is left and the amount due on his mortgage."

The decision of the Supreme Judicial Court of Massachusetts was based upon the earlier case of *Norway Plains Savings Bank v. Moors,* 134 Mass. 129 (1883), in which the plaintiff had taken a mortgage and loaned money to cover the cost of certain construction on the mortgaged property. The owner and the contractor gave an undertaking to complete the buildings. It was found that they contained certain defects which reduced their value, and suit was brought by the mortgagee. In regard to the damages which could be recovered, the Court, speaking through Judge Colburn, said (p. 135):

> "The measure of damages is the difference between the value of the houses as they were in fact built, and the value they would have had if built in conformity to the agreement, or so much of this difference as would have been necessary, with the value of the houses as built, to have paid the mortgage debt and interest then due; and the time for determining these values was the time when the defendant left the houses, as finished, or as soon thereafterwards as the plaintiff had notice of the defects and deficiencies, or might have had such notice, by the exercise of reasonable diligence."

The same measure of damages was applied by the Supreme Court of Minnesota in the case of *Longfellow v. McGregor,* 61 Minn. 494, 63 N. W. 1032 (1895), where the mortgagee-obligee sued the surety for breach of bond conditioned on the principal's building a house by a certain date.

In *German American Title & Trust Company v. Citizens' Trust & Surety Company,* 190 Pa. 247, 42 Atl. 682 (1899), the Supreme Court of Pennsylvania adopted a similar rule of damages in the case where the owner of ground rents instituted suit for the breach of a completion bond. The plaintiff was there limited in recovery to the actual loss in the value of the ground rents.

In a dissenting opinion in the case of *Purdy v. Massey,* 306 Pa. 288, 297, 159 Atl. 545, 548 (1932), Mr. Justice Kephart presents a well-reasoned dissertation on this very question, wherein he approves and adopts the principle of law set forth in the aforementioned decisions and also adopted in this proceeding by the local District Court and unanimously affirmed on appeal by the Circuit Court of Appeals.

In regard to the surety's undertaking, Justice Kephart (p. 299) said:

> "In this case, however, the obligee of the surety's undertaking is not the owner of the property, but a mortgagee, and a different rule is and should be applied, as the mortgagee's interest is different and his loss occasioned by a failure to complete is likewise different. The owner is entitled to have his building as contracted for, but the mortgagee has no such contract as will entitle him to enforce such liability. The mortgagee has no interest in the property as such, (it is only security for his debt); and the fact that a bond

is given guaranteeing completion of a certain building upon it, adds nothing to this status nor does it alter or increase the holder's rights under his mortgage with respect to that property, though it may add to his security. The mortgagee has an interest in the property only in so far as the property stands as security for his debt, beyond this, he has no further interest. All he is entitled to in any case is full and adequate security for the sum he has advanced, and it is difficult to see how he can become entitled to anything more than this by virtue of the surety's undertaking as noted in the completion bond under consideration. The Court below having taken as the measure of damages the cost of completion was, in my opinion, in error.

It may often be that an incompleted structure will be of sufficient security value to protect the mortgagee, or that the land itself may be sufficient for this purpose. It seems plain that in such a case it could not be laid down as a rule that the mortgagee, who is adequately protected, would, by virtue of his bond, be entitled to collect what it would cost to construct the building in its entirety no matter to what extent it might be incompleted.

The correct measure of damage is the loss on the security value of the mortgage caused by the failure to complete. Here appellee's measure of damage is the difference between the value of the land without the building or the building in any state of completion, and the value with the completed building thereon, less the first mortgage; recovery being, of course, limited to the loss thus established on appellee's mortgage. See German-American Title & Trust Co. v. Citizens' Trust & Surety Co., 190 Pa. 247, where the owner of ground rents (a party with an interest quite similar to that of a mortgagee) brought suit for breach of a completion bond. The lower court allowed him as damage, not the cost of the completion of the building, but rather the

loss in the value of his ground rents. In affirming that decision, Justice Fell said: 'The jury were limited to the actual loss in the value of the ground rents, not exceeding the amount of the insurance, and were instructed that that loss would be represented by the difference in the market value of the ground rents if the buildings had been completed as provided by the agreement, and their value with the buildings in the uncompleted state in which they were left. We know of no better rule than this in such a case, and of none more just to the defendant.' Wheeler v. Equitable Trust Co., 221 Pa. 276, supports this view. The contract in that case was held to be one of indemnity, but as explained above the rule for ascertainment of damages should be the same whether the contract is one of indemnity or guaranty.

This question has been admirably discussed and this conclusion reached by Judge Kirkpatrick in Trainor Co. v. Aetna Casualty & Surety Co., 49 F. (2d) 769. So too, in Province Securities Corp. v. Md. Casualty Co., 269 Mass. 75, 168 N. E. 252, the conclusion is, 'The measure of damages is to be based on the difference in the value of the property as security arising from failure to comply with the conditions of the bond.' See also Norway Plains Savings Bank v. Moors, 134 Mass. 129; and Longfellow v. McGregor, 61 Minn. 494, to the same effect.

In the light of the foregoing discussion and on the authority of the cases cited, I would reverse the lower court."

We respectfully submit that, inasmuch as the trial Judge has found as a fact that the value of the buildings in their uncompleted state was in excess of the sum of the amount of appellant's mortgage on each house and all prior liens, the measure of damage (R. 35) which was applied by the trial Judge and affirmed by the Circuit Court of Appeals is the correct rule of damage and should be upheld,

namely, "the measure of damages in this case is so much of the difference between the value of the property as of August 13, 1928, with the houses uncompleted with the value on that date had the houses been completed as would have been necessary to pay the plaintiff's mortgage debt as well as all prior liens, since the value of the property as of August 13, 1928, was more than the sum of the amount of the appellant's mortgage and all prior liens, the plaintiff is not entitled to any substantial damages."

The appellant, however, contends that the case of *Mechanics Trust Co. v. Fidelity & Casualty Co.*, 304 Pa. 526, 156 Atl. 146 (1931), and the majority opinion in the case of *Purdy v. Massey, supra,* present the measure of damages applicable to the present suit. The appellee, on the other hand, submits that the former case is distinguishable from the case at bar in that the plaintiff trust company foreclosed its mortgage, bought the premises at the sale through its straw man, thereafter actually completed the said operation as the owner might have done and later sold the same at a profit. Naturally, the Court in determining the damages due to the plaintiff therein treated it as an owner and allowed it to recover the full sum of moneys *expended* by it in completing the operation. In the case at bar, the petitioner has not spent one penny for the construction of the buildings and was rightly treated as a mortgagee-obligee as distinguished from an owner-obligee. As a matter of fact the $28,000.00 obligation of the Copley Homes, Inc., to The Trainor Company was all profit to the latter company, accruing to it without any capital investment on its part (R. 31), and on which obligation The Trainor Company has received $13,026.02 (R. 35).

The case of *Purdy v. Massey, supra* (decided but with a dissenting opinion) is not so distinguishable from the case at bar but, being contrary to the prevailing decisions in states other than Pennsylvania, should be restricted to its own peculiar facts for the reason that the three authorities cited on page 295 as reported in 306 Pa. do not sustain the conclusions with respect to the measure of damages for which they are cited. *Mechanics Trust Co. v. Fidelity & Casualty Co., supra,* has already been discussed and distinguished. The case of *Equitable Trust Co. v. National Surety Co.,* 214 Pa. 159, 63 Atl. 699 (1906) has been carefully considered and distinguished by Judge Kirkpatrick in his opinion (R. 38), while in the case of *Board of Education v. Maryland Casualty Company,* 27 Fed. (2d) 20 (C. C. A. 3d 1928) the plaintiff was the owner of the property, not the mortgagee, and, as owner, actually sustained damages in completing the operation.

The appellee further submits that the measure of damages applied in the case at bar by the Trial Judge and unanimously affirmed by the Circuit Court of Appeals is not opposed to the law as stated by Your Honorable Court. On the contrary, counsel for appellee has been unable to discover any decision of Your Honorable Court bearing on the question raised herein by the appellant. The case of *Wicker v. Hoppock,* 73 U. S. 94 (1867), in which is set forth the general distinction between an obligation to do a certain thing and an obligation to indemnify against loss, is not authority for appellant's contention. The facts hereinbefore set forth make its inapplicability self-evident.

The appellee further submits that there is no conflict of authority among the Circuit Courts of Appeals for the various Circuits and that there is no such conflict of author-

ity among the Supreme Courts of the various states with regard to the measure of damages applied in the present proceeding as to justify Your Honorable Court's further consideration of this matter.

III. The Trial Court and the Circuit Court of Appeals in Affirming the District Court Were Both Entitled to Exercise Their Independent Judgment Regarding the Proper Measure of Damages to be Awarded the Petitioner.

1. Federal Courts Exercise an Independent Judgment, Irrespective of the Decisions of the Local State Courts in Matters of General Jurisprudence and Commercial Law.

It is urged by the appellant that under Section 34 of the Judiciary Act of 1789 (now R. S. § 721, U. S. C. A. Title 28 § 725) the Federal Courts are bound by the decisions of the local state courts and must follow the decisions of their respective local state courts in awarding damages to a mortgagee-obligee in a suit for the breach of a completion bond. This contention necessitates a study of the aforesaid thirty-fourth section of the Judiciary Act of 1789 as interpreted and construed in the various decisions of your Honorable Court.

The leading case of *Swift v. Tyson*, 16 Pet. 1 (1842) stands for the proposition that the Federal Courts, regardless of state decisions, will exercise their independent judgment upon those questions dependent upon principles of general jurisprudence or relating to general or commercial law. In that case Mr. Justice Story states on page 18:

> "It is, however, contended, that the thirty-fourth section of the judiciary act of 1789, ch. 20, furnishes a

rule obligatory upon this Court to follow the decisions of the state tribunals in all cases to which they apply. That section provides 'that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States, in cases where they apply.' In order to maintain the argument, it is essential, therefore, to hold, that the word 'laws,' in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the Courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases, which have hitherto come before us for decision, this Court have uniformly supposed, that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state

> tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."

This doctrine has been affirmed and elaborated in the many subsequent decisions and become so well established that it hardly needs the approval evidenced by the following cases.

In *Butz v. City of Muscatine,* 8 Wall. 575, 582 (1869), the question was presented whether mandamus lay to compel the mayor of the city and its aldermen to levy a tax to pay a judgment in favor of the plaintiff. The court in exercising its own judgment in this matter said:

> "There are several adjudications of the highest court of the State more or less adverse to the views we have expressed. We do not deem it necessary more particularly to advert to them. Entertaining the highest respect for those by whom they were made, we

have yet been unable to concur in the conclusions which they announce. It is alike the duty of that court and of this to decide the questions involved in this class of cases, as in all others, when presented for decision. This duty carries with it investigation, reflection, and the exercise of judgment. It cannot be performed on our part, by blindly following in the footsteps of others and substituting their judgment for our own.

"Were we to accept such a solution we should abdicate the performance of a solemn duty, betray a sacred trust committed to our charge, and defeat the wise and provident policy of the Constitution which called this court into existence."

In *Baltimore and Ohio Railroad Company v. Baugh,* 149 U. S. 368, 371 (1892), the Court said:

"In all the various cases which have hitherto come before us for decision, this court has uniformly supposed that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character."

Black and White Taxicab and Transfer Company v. Brown and Yellow Taxicab and Transfer Company, 276 U. S. 518 (1928), is a recent case in which the plaintiff sued to enjoin defendant from interfering with plaintiff's prior contract with a Kentucky railroad. The Kentucky courts had held that similar contracts were invalid, while federal courts had sustained such contracts. The court in discussing what law should be applied to the case said:

"The contract gives respondent, subject to termination on short notice, license or privilege to solicit patronage and park its vehicles on railroad property at train time. There is no question concerning title to land. No provision of state statute or constitution and no ancient or fixed local usage is involved. For the discovery of common law principles applicable, in any case, investigation is not limited to the decision of the courts of the State in which the controversy arises. State and federal courts go to the same sources for evidence of the existing applicable rule. The effect of both is to ascertain that rule. Kentucky has adopted the common law and her courts recognize that its principles are not local but are included in the body of the law constituting the general jurisprudence prevailing wherever the common law is recognized. *Hunt v. Warnicke's Heirs,* 3 Hardin 61. *Lathrop v. Commercial Bank,* 8 Dana 114, 121. *Ray v. Sweeney,* 14 Bush 1, 9, et seq. *Aetna Insurance Co. v. Commonwealth,* 106 Ky. 864, 876. *Nider v. Commonwealth,* 140 Ky. 684, 686. And see I Kent's Commentaries (14th ed.) pp. 451, 602. As respects the rule of decision to be followed by federal courts, distinction has always been made between statutes of a State and the decisions of its courts on questions of general law. The applicable rule sustained by many decisions of this Court is that in determining questions of general law, the federal courts, while inclining to follow the decisions of the courts of the State in which the controversy arises, are free to exercise their own independent judgment. That this case depends on such a question is clearly shown by many decisions of this Court."

Mr. Justice Holmes, in a dissent (in which Mr. Justice Brandeis and Mr. Justice Stone concurred) declared that the question before the Court was one of local law for the reason that the authority of the railroad to act had been

given by Kentucky law and the matter pertained to the use of land in Kentucky. Mr. Justice Holmes by way of dictum in the said case furthermore stated that, although he believed the word "laws" as used in the 34th Section of the Judiciary Act of 1789 to include court decisions as well as statutory law and that the said section should have been so construed, the doctrine of *Swift v. Tyson, supra,* had become so fixed in our jurisprudence that he would not reverse it, reserving, however, for further consideration the question of its applicability to problems arising in new fields of law.

However, although the foundations of the rule of *Swift v. Tyson, supra,* have thus been assailed in the dissenting opinion in the aforesaid case and also in the dissenting opinion in *Kuhn v. Fairmont,* 215 U. S. 349 (1909), the rule has nevertheless become so well settled as to necessitate legislative action if a change is to be made therein.

As early as in 1893 it was recognized that the construction placed on the 34th section of the Judiciary Act of 1789 by *Swift v. Tyson, supra,* and decisions subsequent thereto must have been that which Congress intended it to be, otherwise this section would have been amended by Congress, *Baltimore and Ohio Railroad v. Baugh, supra.* More than forty years have elapsed since Mr. Justice Brewer judicially made this observation and yet, in spite of the two aforesaid attacks on the soundness of this rule, Congress has taken no step to amend the section. We, therefore, respectfully submit that under the decisions of your Honorable Court the rule is now well settled that the federal courts are entitled to and duty bound to exercise their independent judgment in matters of general jurisprudence and of commercial law.

That the doctrine of *Swift v. Tyson, supra,* is recognized and applied by *all* of the Circuit Courts of Appeals will be evident by reference to the following decisions:

Sears v. Greater New York Development Co., 51 F. (2d) 46 (C. C. A. 1st 1931);

Cole v. Pennsylvania Railroad Co., 43 F. (2d) 953 (C. C. A. 2d 1930);

Trainor Co. v. Aetna Casualty & Surety Co., 62 F. (2d) 487 (C. C. A. 3d 1932);

Long v. Monarch Accident Ins. Co., 30 F. (2d) 929 (C. C. A. 4th 1929);

Home Ins. Co. v. Currie, 54 F. (2d) 203 (C. C. A. 5th 1931);

Farmers' Bank v. Hayes, 58 F. (2d) 34 (C. C. A. 6th 1932);

Aetna Life Ins. Co. v. Roewe, 38 F. (2d) 393 (C. C. A. 7th 1930);

Odegard v. General Casualty & Surety Co., 44 F. (2d) 31 (C. C. A. 8th 1930);

Community Bldg. Co. v. Maryland Casualty Co., 8 F. (2d) 678 (C. C. A. 9th 1925);

Bu-Vi-Bar Petroleum Corporation v. Krow, 40 F. (2d) 488 (C. C. A. 10th 1930).

Thus there is virtually no question that it is now the settled principle of law supported by copious authority and long tradition that independent action on the part of the federal courts "is precluded only in cases where the state has spoken in its statutes or its courts have laid down some rule of real property or established some settled pol-

icy in regard to local matter." *Cole v. Pennsylvania, supra,* at 957.

As a matter of fact, not only has the said rule been well established in our jurisprudence, but, as so very fittingly and succinctly stated by Mr. Justice Brewer in *Baltimore and Ohio Railroad, supra,* "whatever differences of opinion may have been expressed, have not been on the question whether a matter of general law should be settled by the independent judgment of this court rather than through an adherence to the decisions of the state courts, but upon the other question, whether a given matter is one of local or general law."

2. The Question of Measure of Damages for Breach of a Completion Bond Whether Considered to Be a Matter of Suretyship or of Damages Is Primarily a Matter of General Jurisprudence Concerning Which the Federal Courts May Exercise Their Independent Judgment.

(a) *Questions of suretyship are matters of general jurisprudence.*

In *Odegard v. General Casualty & Surety Co.,* 44 F. (2d) 31 (C. C. A. 8th 1930) suit was instituted on a surety bond given to secure the performance of a contract for the sale of lumber and lumber products. The question there presented was whether state or federal law should be applied in determining the effect of the failure of the obligee to notify the surety of principal's default. The Court held this to be a matter of suretyship governed by general jurisprudence and, therefore, applied federal law.

In *Kansas City Hydraulic Press Brick Co. v. National Surety Co.,* 149 Fed. 507 (C. C. Mo. 1906) and 167 Fed. 496

(C. C. A. 8th 1909) the trial and appellate courts both held that, although the state law governed the question as to whether or not a contract between the city and the contractor was valid when entered into without competitive bidding, the question as to the validity of the surety bond given for the materialmen was a matter of general jurisprudence to be decided independently by the federal court.

The decisions with regard to types of insurance other than surety bonds seem to be more numerous.

As early as 1842 in the case of *Carpenter v. The Providence Washington Ins. Co.*, 16 Pet. 495 (1842) the construction of a fire insurance policy was held a matter of general jurisprudence, although such a contract is by its nature closely connected with real estate. Similarly, *Meigs v. London Assurance Co.*, 126 Fed. 781 (C. C. Pa. 1904), affirmed 134 Fed. 1021 (C. C. A. 3d 1905) is a suit on a fire insurance policy in which the Court when confronted with the problem as to whether a case of double insurance was made out so as to require contribution applied the federal rule as distinguished from the Pennsylvania rule and denied recovery to the plaintiff of that amount which he would have been allowed under the decisions of the Supreme Court of Pennsylvania. In this connection the Court said (p. 784):

> "This is the law of the Federal Courts and while I regret to differ from the view of this controversy taken by the Supreme Court of Pennsylvania, I am bound by the decisions of the appellate tribunals of the United States. *The question is one of general commercial law, upon which the federal courts are at liberty to entertain an independent opinion.*" (Italics ours.)

In *Washburn & Moen Mfg. Co. v. Reliance Co.*, 179 U. S. 1 (1900), the Court held that questions relating to marine insurance were matters of general jurisprudence concerning which Federal Courts could exercise their independent judgment.

Accident and health insurance policies are likewise subjects concerning which Federal Courts exercise their independent judgment. In *Long v. Monarch Accident Ins. Co.*, 30 F. (2d) 929 (C. C. A. 4th, 1929), the Court applied the federal rule in deciding the question whether such a policy had been forfeited when the insurance company failed to apply to the payment of premium the funds which it held due to the assured.

Numerous decisions have been rendered bearing on the federal court's right to construe the various provisions of life insurance policies, irrespective of decisions by state courts on the same subject.

In *Security Life Ins. Co. v. Brimmer,* 36 F. (2d) 176 (C. C. A. 8th, 1929), (Certiorari denied 281 U. S. 744 (1930)), the effect of false representations which were not within the ban of a state statute was held to be a matter of general law.

Similarly in *Aetna Life Ins. Co. v. Roewe,* 38 F. (2d) 393 (C. C. A. 7th, 1930), the federal court refused to follow the state decisions regarding the power of an agent of the insurance company to waive a condition in the policy with regard to the payment of the first premium.

Spinks v. Mutual Reserve Fund Life Ass'n, 137 Fed. 167 (C. C. E. D. Ky., 1905), is a case where the federal court held that the question of validity of a provision in life insurance policy that no suit could be instituted on the same after a lapse of one year following the death of the assured is one of general jurisprudence.

See also *Kibby v. New England Mutual Life Ins. Co.*, 59 F. (2d) 9 (C. C. A. 3d, 1931).

Questions involving the law of guaranty are likewise considered matters of general jurisprudence as distinguished from local law. *Johnson v. Charles D. Norton Co.*, 159 Fed. 361 (C. C. A. 6th, 1908), is a case where in a suit on letters of guaranty the court refused to apply Pennsylvania law, saying on page 363:

> "A contract of guaranty is a well known form of commercial contract as to the construction and effect of which the federal courts are not bound to follow state decisions not based on local statute or usages having the force of local law."

Matters relating to negotiable bonds and especially to the question whether coupons on such bonds bear interest after maturity are governed by the principles of general jurisprudence. *Sears v. Greater New York Development Co.*, 51 F. (2d) 46 (C. C. A. 1st, 1931).

In *Farmers' Bank v. Hayes*, 58 F. (2d) 34 (C. C. A. 6th, 1932), the Court held that the question of the right of a bank as assignee of a contractor to the retained percentage fund as against the surety completing the building operation after default was a matter of general law concerning which the federal court should exercise its independent judgment.

Also in *Bancroft v. Hambly*, 94 Fed. 975 (C. C. A. 9th, 1899), the Court held that the construction of an employment contract was a matter of general jurisprudence.

In this proceeding the subject matter under review is a completion bond which the respondent had executed as surety. Suit was instituted against the appellee as surety

for damages resulting from the breach of said bond. The trial judge found as a matter of fact that the bond had been breached and that the surety was liable thereunder. These questions of fact are not subject to review in this proceeding. The trial judge, however, after making the aforesaid findings of fact and conclusions of law, was confronted with the further problem as to the amount of damages to which the petitioner, as obligee, was entitled under the terms of the said bond to recover from the respondent, as surety. The trial judge, after a thorough and comprehensive review of all the pertinent decisions of the various state and federal courts and especially the decisions of the Supreme Court of Pennsylvania, concluded that the measure of damages due to a mortgagee-obligee for the breach of a bond guaranteeing completion of a building operation was limited to the difference between the value of the property in the condition it existed at default and the amount of principal and interest due on that mortgage and all prior liens.

Thereafter the Supreme Court of Pennsylvania handed down its decision in the case of *Purdy v. Massey,* 306 Pa. 288 (1932), in which the Court on facts, manifestly different from that arising out of the usual building operation, adopted as the measure of damages a rule contrary to that enunciated and adopted by the trial judge in the instant case.

On appeal to the Circuit Court of Appeals for the Third Circuit, the said appellate court in affirming the decision of the court below said:

> "We do not regard the decision in Purdy v. Massey as creating a new local law of Pennsylvania but that, at most, it declared the common law of that state (as those terms are used in the two decisions last cited) with

> respect not to property but to the subject of suretyship, which from its very nature is general law running, like commercial law, broadly through all the states. In such case 'where the common law of the state is derived from the principles of general jurisprudence common to all the states' a federal court may (as we have done) exercise an independent judgment as to what is the law without respect to the decision of the state court as binding authority." (R. 66) (*Trainor Co. v. Aetna Casualty & Surety Co.*, 62 F. (2d) 487, 489 (C. C. A. 3d 1932)).

We, therefore, submit that under the authority of the aforesaid decisions the amount of damages to which the appellant is entitled to recover from the appellee for the breach of said bond, executed by the appellee as surety, was and still is a matter of suretyship dependent upon the terms of said bonds and the Court's interpretation and construction of the same, and, therefore, was and still is a matter of general jurisprudence concerning which the trial judge and the Circuit Court of Appeals for the Third Circuit rightly exercised their independent judgment.

(b) *The questions relating to the measure of damages are matters of general jurisprudence.*

In *Lake Shore & Michigan Southern Railway Co. v. Prentice,* 147 U. S. 101 (1893), the Court was confronted with the question whether the plaintiff could recover punitive damages against the defendant railroad company for the wanton arrest of the plaintiff by the defendant's conductor while the plaintiff was a passenger on defendant's train or whether the plaintiff was limited to compensatory damages. There was a split of opinion on this question among the supreme courts of the various states but the

Court held that this question was a matter of general jurisprudence and, therefore, exercising its own independent judgment, disallowed exemplary damages.

The Court in *Norfolk & P. Traction Co. v. Miller,* 174 Fed. 607 (C. C. A. 4th 1909), also reached the same conclusion on similar facts.

Clark v. Belt, 223 Fed. 573 (C. C. A. 8th 1915), is a case where plaintiff sued for restitution for the defendant's failure to convey land which he had agreed to convey to the plaintiff. The Court held that it was not necessary to determine what the state rule as to damages was because such a question was one of general jurisprudence concerning which federal courts exercise independent judgment. It should be noted that the question before the Court in *Clark v. Belt, supra,* seemingly concerns itself much more with a possible local policy or rule of law than the breach of a completion bond.

In *Bu-Vi-Bar Petroleum Corporation v. Krow,* 40 F. (2d) 488 (C. C. A. 10th 1930), suit was instituted to recover damages for the breach of a contract to drain an oil and gas well. The Court held that the measure of damages for the breach of said contract was a question of general jurisprudence. Likewise the question in this case seemingly concerns itself more with a possible local policy or rule of law than the breach of a completion bond, yet the Court again asserted the matter to be one of general jurisprudence.

Similarly in *Woldson v. Larson,* 164 Fed. 548 (C. C. A. 9th 1908) in a suit involving alienation of affection the Court held that the measure of damages was a matter of

general jurisprudence and allowed the recovery of exemplary damages, although the local state court limited recovery in such suits to compensatory damages. Nor did the Court feel that there was such a question of local public policy involved therein as to require it to follow the local state decisions.

See also *Mitsubishi Shoji Kaisha, Ltd., v. Davis,* 291 Fed. 882 (D. C. N. Y. 1922), where, in suit for damages for non-delivery of goods by carrier, the amount of damages recoverable was a matter of general jurisprudence.

Thus we submit that, if the question at issue in the instant case be considered a matter of Damages as distinguished from a matter of Suretyship (hereinbefore discussed under division III 1. (a)), it was and still is one of general jurisprudence concerning which the trial judge and the Circuit Court of Appeals rightly exercised their independent judgment.

(c) *The use of completion bonds throughout the Nation requires a national uniform law and, therefore, questions pertaining thereto are matters of general jurisprudence.*

Furthermore, irrespective of the question as to whether the amount of damages recoverable by the petitioner be considered a matter of Suretyship or of Damages, we submit that this matter is of sufficient commercial importance so as to warrant the federal courts exercising their independent judgment and establishing a rule of law which will be uniform and applicable in every state of the Union. The surety business is nation wide; it is not restricted to any particular state or group of states. While comparatively few of such bonds are now being written,

when building operations again get under way, such bonds will once more constitute an important part of the surety business. It will then be even more self-evident than now that a uniform law throughout the country with regard to the measure of damages applicable in a suit for the breach of such bonds is as indispensable for the successful promotion of the surety business as the uniformity which is now afforded transactions involving commercial paper and other types of insurance is for those businesses.

We, therefore, submit that for this reason as well as other reasons elsewhere discussed in this brief, the question now before your Honorable Court involves a matter concerning which the federal courts are rightly entitled to exercise their independent judgment.

3. Irrespective of Whether or Not the Question of Measure of Damages in the Instant Case be Considered a Matter of General Jurisprudence the Federal Courts Below Were Entitled to Exercise an Independent Judgment Concerning the Question.

The appellant contends that the Circuit Court of Appeals erred in failing to hold that the law of the instant case is governed by the decisions of the Supreme Court of Pennsylvania in the cases of *Mechanics Trust Co. v. Fidelity & Casualty Co., supra,* and *Purdy v. Massey, supra,* which decisions were handed down on June 27, 1931, and February 3, 1932, respectively. A glance at the docket entries (R. 1) will reveal that these decisions were rendered by the local state court subsequent to the date (February 13, 1931) when the opinion of the trial judge was filed in the instant case wherein leave was granted for the appellant to enter judgment in the amount of $5.00, but

prior to the date (December 21, 1932) when the opinion of the Circuit Court of Appeals was filed.

Granting for purposes of argument that both of the aforesaid recent decisions of the Supreme Court of Pennsylvania are contrary to the rule of law adopted by the trial judge in the instant case and affirmed by the Circuit Court of Appeals, we nevertheless submit that the federal courts in the present proceeding were and still are entitled and under a definite duty to exercise their independent judgment, irrespective of whether or not the question at issue be held to be a matter of jurisprudence. Neither at the time when the trial judge filed his opinion in the instant case nor at the time judgment was ultimately entered had the Supreme Court of Pennsylvania adopted any definite rule on this question. The problem was practically *de novo* in Pennsylvania except insofar as the decisions of the Supreme Court of Pennsylvania on analogous or related situations would indicate what rule would probably be adopted by the state court when confronted with the problem. With the decisions of the local state supreme court in such a state it was the duty of the federal trial judge to exercise his independent judgment, giving due consideration, of course, to the decisions of the Supreme Court of Pennsylvania bearing on analogous and related situations. This the learned trial judge did in a thorough and comprehensive opinion in which he adopted as the measure of damages that rule of law which he considered not only proper and sound but also in line with the then existing decisions of the Supreme Court of Pennsylvania. That the said trial judge acted correctly and that the Circuit Court of Appeals on appeal in this proceeding was likewise entitled to exercise its independent judgment, in spite of the fact that the Supreme Court of Pennsylvania

had in the meantime adopted a contrary rule, is evidenced by the following cases:

In *Burgess v. Seligman,* 107 U. S. 20 (1882), suit was instituted against the shareholders on a judgment obtained against the dissolved corporation of which defendants were shareholders by virtue of a state statute. The defendants, who held the stock in escrow, claimed that they were not liable. After the Circuit Court of Appeals decided that there was no liability, the state supreme court in similar cases decided there was such liability. On appeal, the Court exercised its independent judgment and affirmed the judgment of the Circuit Court of Appeals, saying on page 33:

> "We do not consider ourselves bound to follow the decision of the state court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State Tribunals contrary to that given by the Circuit Court. . . . where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

In *Kuhn v. Fairmont Coal Co.,* 215 U. S. 349 (1910), the following question was certified by the Circuit Court of Appeals:

"Is this court bound by the decision of the Supreme Court in the case of *Griffin v. Fairmont Coal Company,* that being an action by the plaintiff against the defendant for damages for a tort, and this being an action for damages for a tort based on facts and circumstances almost identical, the language of the deeds with reference to the granting clause being in fact identical, that case having been decided *after* the contract upon which defendant relies was executed, *after* the injury complained of was sustained, and *after* this action was instituted?"

The question was answered by your Honorable Court in the negative. On page 360 of the opinion Mr. Justice Harlan said:

"We take it, then, that it is no longer to be questioned that the Federal Courts in determining cases before them are to be guided by the following rules . . . . 3. *But where the law of the State has not been thus settled,* it is not only the right but the duty of the Federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. 4. So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, *or when there has been no decision by the state court on the particular question involved,* then the Federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued."

Concordia Insurance Company of Milwaukee v. School District No. 98 of Payne County, Oklahoma, 282 U. S. 545 (1931), is a recent case in which your Honorable Court

affirmed the right of the federal district court to exercise its independent judgment on the question as to whether under state statute, interest could be recovered on a fire policy from date of liability, the decisions of the state court being at that time in such confusion that the meaning of the statute could not definitely be determined. Furthermore, the Court held it was not bound by a subsequent decision handed down a year after the judgment in the case had been entered by the federal district court.

In *Henry W. Putnam Memorial Hospital v. Allen*, 34 F. (2d) 927 (C. C. A. 2d 1929), the Court held that where there was no decision whatsoever on the question the federal courts were under a duty to exercise their independent judgment, while the case of *John Deere Plow Co. v. Mowry*, 222 Fed. 1 (C. C. A. 6th 1915), stands for the proposition that when there is no settled rule in the state court applicable to the *precise facts*, the federal court will exercise their own judgment. In the latter case the controversy involved the question whether a contract was set forth a conditional sale or a sale secured by a chattel mortgage.

In *Hart v. Adair*, 244 Fed. 897 (C. C. A. 9th 1917), the Court refused to be bound by a recent case of the Oregon Supreme Court, saying on page 901:

> "That decision is not binding upon this court. It does not construe or apply any state statute. Nor does it create a rule of property. And, even if it did, it would not be controlling authority here; for it was not rendered until a year after the court below decided the case which is now before us, and not until long after the rights of the plaintiffs had accrued under the assignment. A federal court is not bound by the decision of the highest court of the state in such a case. Burgess

v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; Carroll County v. Smith, 111 U. S. 556, 562, 4 Sup. Ct. 539, 28 L. Ed. 517; Julian v. Central Trust Co., 193 U. S. 93, 103, 24 Sup. Ct. 399, 48 L. Ed. 629; Great Southern Hotel Co. v. Jones, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778; Jones v. Great Southern Fireproof Hotel Co., 86 Fed. 370, 30 C. C. A. 108; City of Mankato v. Barber Asphalt Paving Co., 142 Fed. 329, 73 C. C. A. 439."

See also *Dernberger v. Baltimore & Ohio Railway Company,* 243 Fed. 21, 40 (C. C. A. 4th 1917).

We, therefore, submit that irrespective of whether or not the question of measure of damages in the instant case be considered a matter of general jurisprudence, the Federal Courts below were entitled to exercise an independent judgment concerning the question.

Conclusion.

It is submitted that there is no substantial difference as to the measure of damages recoverable by a mortgagee-obligee for the breach of a bond guaranteeing completion of a building operation and for the breach of a bond indemnifying said obligee against loss for failure to complete. In the event that the mortgagee sues for breach of either type of bond, the measure of damages recoverable by said mortgagee-obligee is limited to the difference between the value of the property in the condition in which it was at the time of default and the amount of principal and interest due on the mortgage and all prior liens. And furthermore, since the measure of damages is a matter of general law, the Federal Court may exercise its independent judgment and apply the aforesaid measure of damages, irrespective of any decision of the local state Supreme Court which is in apparent conflict therewith.

It is, therefore, respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

JOSEPH W. HENDERSON,
THOMAS F. MOUNT,
Counsel for Appellee.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 13.—October Term, 1933.

The Trainor Company, Petitioner, *vs.* The Aetna Casualty & Surety Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[November 6, 1933.]

Mr. Justice Sutherland delivered the opinion of the Court.

On October 13, 1927, petitioner conveyed to a building company a tract of real estate consisting of fifty-two lots, with the result that the building company became indebted to petitioner in the sum of $28,000, being part of the purchase price. The building company, in order to finance its operations, borrowed sums of money from two different corporations, to one of which it gave a first mortgage upon the real estate, and to the other a second mortgage. The building company then gave to petitioner its note for $28,000, and assigned as collateral security therefor its equity in the second mortgage. Petitioner accepted this security—in effect a third mortgage—upon the representation and warranty of the building company that a building and certain improvements would be erected, in accordance with plans and specifications, upon each of the fifty-two lots. The performance of this obligation was guaranteed by a bond in the sum of $220,000, executed by respondent, conditioned, among other things, to become void if within ten months from the date thereof, October 13, 1927, each of the fifty-two lots should be fully improved with a building, together with certain other improvements, in keeping with, and as shown by, the plans, specifications, etc.; otherwise to remain in full force and effect. The property is located in Pennsylvania, and the contract and the obligations of the bond were to be performed within that state.

Suit was brought in a federal district court for the eastern district of Pennsylvania to recover damages for a breach of the bond. A jury was waived; and after a hearing, the trial judge found

that on August 13, 1928, the date fixed for the completion of the buildings and improvements, twenty-four of the houses had been completed and twenty-eight had not been fully completed. The value of the lots with the twenty-eight uncompleted houses, as of the date last mentioned, was $6,700 each, an amount slightly in excess of the sum of petitioner's mortgage on each and of all prior liens. Completed, they would, on that date, have been worth $7,950 each. It is not disputed that at the time of the breach of the bond petitioner, under the terms of the mortgages, was powerless to protect itself by foreclosure; and the court found that thereafter the value of real estate, generally and in the locality, had steadily declined. On January 25, 1930, the first mortgage was foreclosed and the property bought in for the sum of $50, thus wiping out the second mortgage and the equity of petitioner therein. Petitioner has received on account of the indebtedness of $28,000 the sum of $13,026.02 only, leaving $14,973.98 still owing on the principal.

Upon these facts the trial court held that while the *owner* of property, in case of a default after partial performance of a building contract, would be entitled to recover from the surety the difference between the value of the property with the uncompleted buildings and its value with the buildings completed, the rule is otherwise in the case of a *mortgagee-obligee*. Following this view, that court concluded that the measure of damages in the instant case "is so much of the difference between the value of the property as of August 13, 1928, with the houses uncompleted, and the value it would have had on that date had the houses been completed as would have been necessary to pay the plaintiff's mortgage debt as well as all prior liens. Since the value of the property as of August 13, 1928, was more than the sum of the plaintiff's mortgage and prior liens, the plaintiff is not entitled to any substantial damages." The court, therefore, awarded nominal damages only. 49 F. (2d) 769. This judgment the circuit court of appeals affirmed. 62 F. (2d) 487. With that conclusion we are unable to agree.

It is very clear that the settled rule in Pennsylvania is to the contrary. In *Purdy* v. *Massey*, 306 Pa. 288, where prior cases are reviewed, the court held that where there is an absolute undertaking to erect and complete a building, the surety in case of default is bound to take the place of the principal and erect the

building, and the cost of doing that which should have been done is the measure of damages for which the surety is liable, not exceeding the amount of the bond. There the owner of a first purchase money mortgage had subordinated her security to another mortgage in consideration of the giving of a bond in all substantial respects like the one here under consideration. The building provided for was not erected, and the mortgagee brought suit against the surety on the bond. The court held that the bond was one of guaranty and awarded as damages the full cost of completion, such cost not exceeding the amount due on the mortgage. The applicable rule is thus stated (p. 295):

"In fixing compensation for damage resulting from breach of a contract the general rule is that the injured party should be placed in the same position as if there had been no breach. The object of the law is to place such party in as good position as if the contract had been kept. In the instant case the bond guaranteed the completion of the building; if there had not been a breach of the obligation of the bond, the building would have been erected. Since this was not done, the plaintiff can only be put in as good position as if the contract had been carried out by giving her the cost of construction, not exceeding, of course, the amount of the bond. The measure of damage on a bond guaranteeing completion is the cost of completion; . . . And in a case such as this, where the work was never begun, this cost will be the whole cost of construction."

See also *Mechanics Trust Co.* v. *Fid. & Cas. Co.*, 304 Pa. 526, 533, *et seq.* A like rule obtains in other states. *Real Estate Co.* v. *McDonald*, 140 Mo. 605, 612; *Kidd* v. *McCormick*, 83 N. Y. 391. Compare *Wicker* v. *Hoppock*, 6 Wall. 94, 99.

The circuit court of appeals held that the Pennsylvania decisions merely declared the common law of that state with regard to suretyship, and, since that law is derived from the principles of general jurisprudence common to all the states, a federal court in determining what it is might exercise an independent judgment. We do not deem it necessary to discuss the principle enunciated or to decide whether the Pennsylvania decisions come within it. It is enough to say that even where the principle applies, "for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt." *Burgess* v. *Seligman*, 107 U. S. 20, 33-34. And see *Sim* v. *Edenborn*, 242 U. S. 131, 135,

where the authorities are collected; *Community Bldg. Co.* v. *Maryland Casualty Co.*, 8 F. (2d) 678, 680. In the present case it would not be going far enough to say merely that the question is "balanced with doubt," for it seems to us that the Pennsylvania decisions, and those of the other states cited above, are plainly right. Compare *Messenger* v. *Anderson*, 225 U. S. 436, 444.

The petitioner here, not being willing to accept a third mortgage on the unimproved land to secure its debt, required the added security which would be afforded by completed improvements. These improvements the building company agreed to make within a definitely fixed time, and for the performance of that undertaking respondent, for a valuable consideration, stood sponsor. Plainly the obligation of the bond was one of guaranty and not indemnity, and could be fulfilled only by the erection of the buildings or payment of the penalty in case of default. It is no answer to say that the value of the property immediately after the default exceeded the sum of the mortgage together with all prior liens. Petitioner was then without remedy against the property because its mortgage was not in default. It was, therefore, obliged to sit by and await the action of others over which it had no control. In the meantime, the uncompleted buildings necessarily lay unroofed, subject to expense in the way of taxes, insurance, accumulating interest, etc., deteriorating in quality and steadily declining in value. Petitioner is entitled to be put in as good position in respect of its debt as it would have occupied if the buildings had been completed in accordance with the terms of the undertaking; and this can be done here only by giving it the amount of the difference between the value of the unfinished buildings and their value as it would have been if completed in accordance with the agreement—see *Kidd* v. *McCormick, supra,* p. 398—but exceeding neither the amount due on its debt nor the amount of the bond.

It appears from the findings that this difference would be about $26,000, while the amount now due petitioner is $14,973.98, together with interest thereon from August 13, 1928. It follows that the judgments of the courts below must be reversed and the cause remanded to the district court with directions to enter judgment for the last named sum.

So ordered.